OFFICE SUPREME COURT U. S.
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IN THE

United States Supreme Court.

OCTOBER TERM, 1880.

TIPTON COUNTY

—vs.—

THE ROGERS LOCOMOTIVE AND MACHINE WORKS.

No. 75.

BRIEF AND ARGUMENT

—OF—

Humes & Poston and S. P. Walker,

FOR DEFENDANT IN ERROR.

IN THE

Supreme Court of the United States.

October Term, 1880.

TIPTON COUNTY,
Plaintiff in Error,
—vs.—
THE ROGERS LOCOMOTIVE AND MACHINE WORKS,
Defendant in Error.

No. 75

BRIEF AND ARGUMENT

—OF—

HUMES & POSTON AND S. P. WALKER,

For Defendant in Error.

This action is brought to enforce the collection of fifty (50) bonds for five hundred dollars each, all dated 1st day of January, 1869, due and payable January 1st, 1873, with 6 per cent. interest per annum, interest payable annually.

These bonds were signed, sealed and delivered by the proper officer of Tipton county to the Mississippi River Railroad, and their genuineness is not denied, but admitted so far as proper execution by the proper officers is concerned.

See Record, pp. 10, 11.

They were issued in aid of the construction of the Mississippi River Railroad through the river counties of West Tennessee, and were delivered by the county of Tipton to the proper officers of said Railroad Company on the 21st day of July, 1869, who, to evidence the interest of said county in said Railroad, and the consideration of such subscription and payment executed and delivered to said county on the same day $200,000 of its stock, evidenced by a stock certificate for that sum.

See Record, p. 11.

Tipton county defending relies, in first place, upon its want of power to make the subscription and lend the aid it did, without first submiting the question to a vote of the people for ratification or rejection.

Secondly, upon the fraudulent practices indulged in by the officers of the Railroad in the procurement of the subscription, which it claims vitiated the loan or subscription.

The case, after a most laborious argument to, and investigation by, the late Hon. H. H. Emmons, Circuit Judge, was under proper instructions submitted to a jury, who found in favor of the defendant in error, and this appeal in the nature of a writ of error was taken by the said county of Tipton.

This cause and those dependent upon it involves $750,000.

LAW OF THE CASE.

The defence to these suits calls in question the constitutionality of the statutes under which the bonds sued on were issued by the county of Tipton. It is said these stat-

utes violate the eighth section of the first article, and the seventh section of the eleventh article, of the constitution of Tennessee. This eighth section provides that "no freeman shall be deprived of his life, liberty, or property but by the *law of the land.*" This seventh section of the eleventh article prohibits the Legislature "from suspending any general law for the benefit of any particular individual, or from passing any law for the benefit of individuals inconsistent with the general laws of the land, or from passing any law granting to any individual or individuals, rights, privileges, immunities or exemptions other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law. *Provided always, the Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good.*"

Article 1, Sec. 8, Con. Tenn., see Thompson & Steger's Code, p. 75.

Article 11, sec. 7 Con. Tenn., see Thompson & Steger's Code, p. 115.

Article 11, sec. 7, of the Constitution of Tennessee, adopted in 1834, is the same as sec. 8, art. 11, of the constitution of 1870, down to the end of the first paragraph. The Constitution of 1834, then, has following the first paragraph the proviso alone, while the constitution of 1870 omits the proviso and adds a new clause. The statutes in question here were passed under the constitution of 1834.

See Thompson & Steger's Tennessee Code, p. 115, sec. 8, and note "a."

The defence say that the General Assembly of Tennessee, at the session of 1851-2, chapter 117, p. 161, of the

Acts of 1851–2, carried into the code of 1858, secs. 1142 to 1165, inclusive, provided by a general law the mode in which counties and incorporated towns should subscribe to railroads, and that by this general law a popular vote was necesary to the validity of a county or town subscription; that the Acts of the Legislature of February 25, 1867, ch. 48, sec. 5, pp. 130, 131, and of February 12, 1869, ch. 45, secs. 28, 29, 30, pp. 210, 211, authorizing the County Court of any county along the line of the Mississippi River Railway to subscribe for stock in said road, dependent not on a popular vote, but on a vote of the County Court, "*a majority of the justices in commission at the time concurring*," violates the general law above and suspends it as to these counties and for the benefit of this particular railroad.

We reply, that the *proviso* to the seventh section of the eleventh article of the Constitution of 1834 expressly reserves to the Legislature the power to suspend general laws and grant special privileges, immunities and exemptions, when they create or amend charters of incorporation. Its language is, "*Provided always, the Legislature shall have power to grant sach charters of incorporation as they may deem expedient for the public good.*"

A proviso in a statute or constitution is a limitation or exception to the *grant made, authority conferred, or restriction imposed.* "A proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or in some measure to modify the enacting clause."

Wayman v. Southard, 10 Wheaton, 30.

The words, "*provided always*," clearly mean to except from the restraining clause the power of the Legislature

to suspend general laws, to grant special privileges, immunities and exemptions, when exercised in the creation and amendment of charters of incorporation. The very position of this proviso or excepting clause, proves that by it the convention intended to except from the *restraining clause* the power of the Legislature to suspend laws, etc., when exercised in the creation of charters of incorporation. *It immediately follows the restraining clause.* Its meaning, as a full exception, is also proved by the strong words used to introduce it, that is, "*Provided always*," not simply "*provided*" or "*except*," but "*provided always.*" The word "*always*" here certainly cannot be in the sense of "*forever*," for, if so, it would be untrue and useless; untrue, for it could only last until the constitution was changed; and useless, for the proviso must continue in force until the constitution is changed, without the use of the word "*always;*" therefore, the only meaning which can be put upon this word is, that, by it, the convention meant to use an *emphatic word*, showing the exception to be as broad as the restraining clause and of equal force. We submit, also, that the language of the proviso, in its natural import, makes the power of the Legislature as broad in granting corporations as the restraining clause. "*The Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good.*" Language could not have been used more appropriate to confer absolute control and discretion on the Legislature; it is saying, "notwithstanding the restrictions of this prior clause, the Legislature, as they may deem expedient for the public good," shall have power to charter incorporations. The limit is, "*what the Legislature may deem expedient for the public good;*" these are words entrusting the matter to the absolute discretion of the

Legislature, taking them according to their appropriate, natural, obvious and popular meaning. The language of a constitution should always be construed and interpreted by the courts according to its obvious and popular import, because it is an instrument framed to be submitted to and adopted by the people. The people only read it, with the help of common sense, and so it must be interpreted.

Story's Constitution, sec. 210.
Cooley's Con. Lim., pp. 55, 56, 57.
9 Wheaton, 188.

In our own State the rule of construction is thus defined: "It is a general rule that the words of a statute, if of common use, are to be taken in their natural and ordinary sense, and without any forced or subtle construction to limit or extend their import.

1 Wheat., 326. 20 Wend., 561.
State v. C & R. Turnpike Co., 2 Sneed, 88.
Wingfield v. Crosby, 5 Cold., 245.

The Legislature of Tennessee can do all things not prohibited by the Constitution of the United States or of this State; within these limits it is like the Parliament of Great Britain, omnipotent; the State constitution is not a grant of Legislative power, but a restriction and limitation upon it; therefore, whatever the constitution does not prohibit or restrain, the Legislature may do.

Bell v. Bank Nashville, Peck's (Tenn.) R., 269.
Hope v. Deaderick, 8 Hum., p. 8.

In the first case the facts were: Defendant made a note which was endorsed to the bank; the bank sued on it; defense by demurrer, that the bank had no corporate exist-

ence, because the Legislature could not create corporations. Held, that the Legislature is omnipotent, except as restrained by the Constitution of the United States or of the State, and therefore it could create such a corporation.

In the last named case, suit by Deaderick, a resident of, and real estate owner in the town of Knoxville, against Hope, tax collector, to test the legality of a tax on real estate in Knoxville, imposed by the town under a special act passed in 1815. Ground of defense that Legislature could not delegate to a town or county the power to impose taxes, citing Marr v. Enlo, 4 Yer. R. Court held tax legal, because the Legislature has unlimited power of legislation, *except so far as it is restrained by the Constitution of the United States and of the State of Tennessee.*

"It must be borne in mind, that in determining what power the Legislature of a State may rightfully exercise, *the Constitution of a State is not to be regarded as a grant of power. The Legislature possesses inherently all legislative power, and the Constitution is to be construed as limiting or restricting, but not as granting the power.*" This opinion was delivered by the Supreme Court of Tennessee, in September, 1877.

See Knoxville & Ohio R. R. Co. v. Hicks.
Mss. herewith filed as Exhibit "H."

Bearing this in mind, the conclusion is irresistible, that by virtue of the "provided always" clause of sec. 7, article 11, the legislature has power, in creating corporations, to grant special privileges, immunities, and exceptions, and exemptions, and to suspend general laws, the argument stands as follows: "But for sec. 7 article 11, the legislature could grant special privileges, etc., could suspend gen-

eral laws, for it is omnipotent; but section seventh although it prohibits this power in general terms, yet *it takes away the restriction as applicable to charters of incorporation*; hence, in granting charters of incorporations, the legislature may grant special privileges, and suspend general laws."

What did the framers of the Constitution of Tennessee mean by adding this exception and proviso to the seventh clause of the eleventh article in favor of corporations? It is "Provided *always*, the legislature may grant such charters of incorporations as they may deem expedient for the public good."

The legislative and judicial history of corporations in Tennessee prior and up to the year 1834, when this Constitution was framed, will give a sure test to ascertain the nature of the corporations, which the framers of the Constitution of 1834, in making the proviso to the seventh section of the eleventh article, meant the legislature should still have the power to create.

First we will review the judicial history:

In Bell v. Bank of Nashville, Peck's Reports, 269. Decided in 1823.

Suit on a note made and endorsed to the bank for money loaned.

Defence by demurrer. Cause, "that the legislature of Tennessee could not create a banking corporation."

Held, "The Legislature of Tennessee, like the legislature of all other sovereign States, can do all things not prohibited by the Constitution of this State or of the

United States; and may, therefore, create a corporation with banking privileges."

In Hays v. Bank of Tenn. Martin & Yerger's R., 179, decided in 1827.

Judgement by confession on a special agreement attached to the note of Hays when he negotiated it to the bank. Motion to vacate, and writ of error.

One, among other defenses, was that this *summary mode of taking judgment granted to this bank*, was unconstitutional. Court held: "As to this summary mode of proceeding, whether politic or not, is not for us to determine; so far as it does not conflict with those constitutional privileges, which belong to the citizen, we are as much bound to carry into effect the will of the legislature in reference to them as any other subject." This case is very instructive, for it clearly lays down the rule that, prior to 1834, the legislature might create *a corporation*, by charter, that is by special act, and give to it, in suspension of the general law, the power to take a summary judgment against its debtors.

The court, in the above case, cite and rely on:

Bank of Columbus v. Oakley, 4 Wheaton R. 240.

As similar to, and settling the principal of the case before them. The 4 Wheaton case was a summary judgement by the bank against Oakley on his note, taken under the Act of Assembly of Maryland, of 1793, ch —— incorporating the Bank of Columbia, which allowed the bank on default of payment of a note due the bank, to apply to the clerk of the General Court and obtain an execution on the note. The defence was, a motion to quash the execution, upon the ground that this privilege given by the charter to the bank

was contrary to the Constitution of the United States and of Maryland. Held, to be a valid law of the land under the twenty-first article of the declaration of rights of the State of Maryland, which provides that no freeman shall be deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

The Martin & Yerger case, and the 4 Wheaton case, hold the principle, that the charter of a corporation may suspend a general law, provided no constitutional prohibition or provision is violated.

In Mitchell v. Franklin & C. Turnpike Company, 3 Hum., 469, decided in 1842.

The acts of 1831, ch. 78, of 1832, ch. 147, and of 1832, ch. 147, and of 1833, ch. 255, chartered the defendant company to locate a road on lands of private persons, and to get from lands of private persons materials to build the road with; they also prescribed a *special remedy* to recover damages to lands thus appropriated, and they designated a special tribunal.

Act of 1835, ch. 14, renewed the charter. Act of 1836, ch. 4, authorized a re-location of the route.

Suit at common law by Mitchell to recover damages to his land. Held, this charter was a public law, establishing the road for the use of the public, pointing out a special remedy, designating a special tribunal, by which private persons should get redress for injuries to their lands, and that this charter was valid and constitutional. This case does not discuss these questions, but the charter was challenged as unconstitutional, and this special remedy

also; and yet the court sustained the charter and the special remedy, holding three important propositions.

First. The charter of a Turnpike Company is *a public act* and *law.*

Secondly. In such charter, the company can legally be authorized to take *compulsorily a man's land for the bed of the road*, and *materials from his* other lands to build the road with.

Thirdly. By the charter the common law remedy may be taken away, and, in lieu thereof, *a special remedy* before a *special tribunal* provided, and the citizen compelled to resort thereto.

The original charter and two amendments were enacted prior to 1834, under the State Constitution of 1796; while the renewal act of 1835, and that of 1836 changing the route were passed under the Constitution of 1834. Yet, under both, those acts were held valid.

In Nolensville Turnpike Co. v. Baker, et al, 4 Hum., 316.

This company, although chartered in 1836, refers for its privileges to one passed prior to 1834, and hence may be looked to as a charter granted before 1834. The court held, "that by its charter, the franchise of occupying the land, on which an old public road existed, was granted to this company to the discontinuance of the public road, so that the public were compelled to travel and pay toll on the turnpike road, though it did not occupy the entire bed of the old public road."

Here, by a private charter, a public road was discon-

tinued, and the traveling public compelled to travel on the road of, and pay toll to, a private company.

In Union Bank v. State, 9 Yerg., R., 490.

The act of 1820, ch. 117, created the Union Bank. The eleventh section provided, that, in consideration of the banking privileges granted, the bank should pay one-half of one per cent. on its capital to the State. Held, that this one-half of 1 per cent. was in lieu of all taxes; and being a contract, the State could not, by a subsequent statute or amendment to the State Constitution, impose an additional tax. This charter suspended a general law imposing taxes uniformly, and granted a special exemption from all future taxation.

In Hazen v. Union Bank, 1 Sneed, R. 115, was a bill to enjoin collection of a note on the ground of usury.

Charter of the Union Bank (Act of 1832, ch. 2, sec. 11) provides, that this bank may discount paper, having over three and less than six months to run to maturity, at the rate of 7 per cent. per annum.

The general statute of 1819, ch. 32, fixed a uniform rate of interest over the State at 6 per cent. per annum, and declared any excess over 6 per cent., usurious and void, whether taken by a natural person or corporation. This general law was in force when the charter of the Union Bank was enacted, and when the loan was made. The note in question was discounted at 7 per cent. and had four months to run to maturity. Hazen, the maker of the note, insisted that the general law (Act of 1819, ch. 32) in force at the date of the charter, and also of the loan, fixed the legal rate at 6 per cent.; that under the State Consti-

tution of 1796, no one's rights could be taken or affected, but "*by the law of the land;*" by which was meant a general public law, equally binding on all. That the bank, under its charter, had taken a higher rate of interest than others could under the general law, therefore the bank charter permitting it to do so is a partial law, and repugnant to the Constitution. The court held it was not a partial law in the sense of the Constitution, because:

First, to grant incorporations is an incident of sovereignty belonging to every sovereign State; with us it is exercised by the Legislature: and this body may lawfully confer upon the corporators any rights and privileges it may deem proper and expedient, not inconsistent with the Constitution of the State or the United States. A charter is not like an ordinary law prescribing a rule of action, which should be general in its action, but *is a law in the nature of a contract*, granting a franchise to the corporators, and investing them with a legal estate therein. It cannot be deemed a partial law in the sense of the Constitution of this State.

The business of banking was a common law right, that any person might lawfully exercise, until it was restrained by the act of 1827. This law operates as a general prohibition against the exercise of this right, except when granted as a franchise to natural-persons, or incorporated companies. But it has never been considered that the charters containing these exclusive privileges of banking are repugnant to the Constitution, as not being "laws of the land" of general application. The court further say, "the right to take a greater interest than allowed by the general law, and the right to pursue the business of bank-

ing is in virtue of the exclusive grant denied to others, and if one be repugnant to the Constitution because not a general law or law of the land, so must the other; but neither is."

The court further say, "There was nothing in our State Constitution at the date of this charter (1832) *declaring that interest shall be uniform.* This provision is contained in the Constitution of 1834, and being general and imperative in its terms, no law or franchise can have a legal existence which stands in opposition to it."

This case establishes principles of great importance to the question under consideration.

First, that partial laws were as repugnant to the eighth section of the first article of the Constitution of 1796, as they are to the seventh section of art. 11, of 1834.

Secondly, that in granting a charter of incorporation, the Legislature may suspend general laws, provided they do not violate any positive provision of the Constitution.

Third. It is an important instance of the Legislature's having granted to a corporation two rights in suspension of general laws, and because these rights were not in violation of any positive provision of the Constitution, the courts held them valid, one of the general laws thus suspended being a general prohibition against banking by any one, and the other establishing a general and uniform rate of interest.

These six cases, extending over a period of thirty years, from 1823 to 1853, show a uniform recognition by the

courts of the power of the Legislature, under the Constitution of 1796, to grant franchises to corporations, in suspension of general laws, granting exclusive and special privileges and immunities by special acts; and that such grants were not partial laws in the sense of not being "*the law of the land*," and that the only limit to this power was, that such grants must not be opposed to any positive provision of the Constitution.

Adversary counsel claim that one decision of the Supreme Court of Tennessee is not in harmony with the foregoing cases. It is the case of

Budd v. State, 3 Hum. R., 483, A. D. 1842.

This case simply decides that a section of the act chartering the Union Bank, which declared embezzlement, or the making of false entries by any officer, agent or servant of this bank, a felony, is not to be regarded as part of the charter contract between the State and bank, but as an independent act creating a felony as to the agents of one person. The court then hold, it is partial, because it does not extend to the agents of all the banks in the State, so as to make it apply to all persons in the State under like circumstances.

Now we propose to review the legislative history of North Carolina and Tennessee corporations, embracing counties, municipalities or towns, and private corporations. This review will show first, that the Legislature of the colony of North Carolina, from 1720 to the date of its erection into a sovereign State, created and organized *all* the counties of that State, including those of which Tennessee was formed in 1796, by *special acts* applicable

alone to one or more new counties; that in these acts the county courts or commissioners were authorized to select and purchase suitable county sites, to contract for and have erected court-houses, prisons, stocks, bridges, ferries, and other county improvements, and to pay for the same by the levying of a special tax authorized alone for the county or counties named in the several acts. This uniform course of legislation extended on to the creation of the State of Tennessee out of a part of North Carolina. The same is uniformly true as to the creation of towns, being always done by special acts, and in no instance by a general law. This legislative history also shows, during same period, a uniform course of dealing with the old counties, that is, by special acts to authorize counties named to make improvements and lay taxes for those special purposes by these special acts. See Exhibit "A."

This review will also show that the Legislature of North Carolina, while Tennessee formed a part of it, and the Legislature of Tennessee from the time it became a State in 1796 to 1834, granted charters to banks by special acts, exempting them from taxation when a general law was in force requiring uniformity of taxation throughout the State; giving them the special right of banking when a general statute existed forbidding all persons from banking, and giving the right to exact more than six per cent., when a uniform rate of interest by statute at six per cent. existed; also charters to private canal, turnpike and road companies, giving to them the right of eminent domain, and exempting their property from taxation. From 1834, the date of the second constitution of Tennessee, to 1852, the date of the first general improvement act, at every ses-

sion of the Legislature special acts were passed chartering railroad companies, authorizing the State, county and towns, and private corporations to take stock in certain named railroad companies, and prescribing no popular vote. There were several before 1845, but we commence with the acts of that year, because that act was declared constitutional in Nichol v. Nashville, 9 Hum. R., 252.

There are twenty of these railroad charters, enacted by the Legislature of Tennessee, commencing December 11, 1845, up to February 28, 1852.

See list of them, Exhibit "B."

Many of these twenty railroads are now in successful operation, having been built by subscriptions of stock made under their charters by counties, towns, private persons, and no popular vote required as to the counties and towns.

But, say the adversary counsel, all these acts were passed before the General Improvement act of 1852, ch. 117, which for the first time prescribed a uniform mode of obtaining subscriptions from counties and towns throughout the State, and made submission to a popular vote in each county or town proposing to subscribe a vital, essential condition precedent to the validity of such subscription. After the passage of this act, ch. 117, 1852, (the general law of the land,) then it became unconstitutional for any legislature to vary the mode of obtaining county or town subscriptions (by a special act) from that prescribed by the act of 1852; especially to do so by omitting the submission to a popular vote.

We reply, the general law, before the act of 1852, ch. 117 was, that no county or town could subscribe for stock in any railroad on any terms, because the Legislature had not authorized them by statute, the only mode of acquiring the power. By the general law prior to 1852, no county, no town, nor their people could be burdened with a subscription. This was the general law binding on all, yet as we have above shown, the Legislature, by repeated acts from 1835 to 1852, authorized such subscriptions to railroads, to turnpike companies, to bridges, etc., by particular designated names, delegating the power to the county courts without a vote of the people. Such special acts were as violative of the general law, as it then stood forbidding any and all counties and towns to make such subscriptions, as our special acts of 1867, 1869, are of the act of 1852. Before the general improvement act, no town, no county could burden its people in any mode with these subscriptions; but the Legislature could and did by special acts authorize particular counties and towns to do it in the particular modes prescribed in the act, although all others were forbidden by the force of their want of power. But all special act suspended as to them, this general law forbidding any county in the State to subscribe such stock. By the general law prior to 1852, the prohibition was absolute, yet special acts were passed as to some of them, prior to 1852, and conferring these novel and strange powers. The conclusion must be that the special acts passed prior to 1852 were as much obnoxious to the constitutional objection as an act passed since. A general law prescribing a particular mode of doing, is of as high constitutional dignity, as one forbidding the doing of such act altogether, and of no higher. Have not the

Legislature as much control over a law prescribing a particular mode of doing an act, as over one forbidding such act, altogether? Can the Legislature, by special act relating to only one or a few counties, remove a general, absolute prohibition, and yet, cannot vary the mode of a general statute, allowing such acts? It is obvious to any intelligent mind that the acts prior to and those subsequent to 1852 are alike constitutional and binding, or the reverse, and hence the special acts and decisions thereon passed prior to 1852 are as authoritative as those subsequent.

But to continue our review of the legislative history since 1852.

The general internal improvement act of Tennessee was passed on the 22d of January, 1852, ch. 117, prescribing a particular mode of making subscriptions by any county or town in the State to works of internal improvement, as to railroads, turnpikes, etc., and when subscriptions are made under that act, they are dependent on a popular vote in their favor, that is a majority of the votes in any such county or town.

The act of January 24th, 1854, amendatory of that of 1852, ch. 117, provided that in county subscriptions made under the act of 1852, the majority should at least equal a majority of the votes cast at the last preceding gubernatorial election.

The prior act of 1852 allowed counties to issue their 6 per cent. warrants in anticipation of their annual levies. We have collected no less than forty-four special acts passed from 1851 to 1870, whereby special authority is granted to

certain named counties and towns to subscribe stock in railroads and turnpike companies, in bridge companies and ferries. Some of them authorize subscriptions by county courts without a popular vote; and some on a mere majority of those actually voting, while the general act of 1854, amendatory of the act of 1852, ch. 117, required a majority of all the votes according to the gubernatorial election immediately preceding such vote. Some require even the vote of the justices to be only a majority of those present and at any monthly term. Nearly all of them allow bonds at ten to thirty years, on a per cent. varying from six to eight, while the general law only allowed warrants. Exhibit D shows the action of each successive Legislature from 1852 to 1870, a period of eighteen years, declaring uniformly at each session their power, notwithstanding the existence of the act of 1852, ch. 117, to prescribe any mode of subscription they might deem expedient for one county or one town, or any number of counties and towns; and never once deeming that the act of 1852 as binding on their discretion. How futile such a legislative restraint would have been, since it could have been repealed by any Legislature who felt its restraining influence.

We add, in exhibit E, fourteen other acts of special legislation as to counties, authorizing particularly named counties to make internal improvements and levy taxes to pay for them without a popular vote, and this by special acts.

Now we propose to review the decisions of the Supreme Court of Tennessee on special acts of the Legislature, passed after the date of the general improvement act of 22d January, 1852, ch. 117, and which special acts were

departures from the general improvement act; in that, some of them dispensed with the popular vote entirely, others required only a mere majority taking the gubernatorial vote immediately preceding as fixing the number; others authorized the issuance of bonds, while the general act only authorized county warrants on the treasury.

Nichol et al v. Mayor and Aldermen of Nashville. 9 Hum. R., 258, A. D., 1848.

Bill in equity filed by taxpayers of Nashville against the city, to enjoin the issuance of bonds, to pay a city subscription to the Nashville & Chattanooga R. R. Co., and to have the subscription declared void.

Nashville was and is an *incorporated* town in Tennessee. By a special act of December 11th, 1845, said R. R. Co. was chartered to build and run a road from Nashville to Chattanooga; and the seventeenth section authorized any State, or any citizen, corporation or company, to subscribe for and hold stock in said company with all the rights and subject to all the liabilities of any other stockholder."

Under this section the Mayor and Aldermen of Nashville subscribed 20,000 shares in the capital stock of the Nashville & Chattanooga R. R. Co. On the 9th of December, 1854, by a special act, the Legislature provided, "that the town of Nashville be authorized, through the Mayor and Aldermen to subscribe 20,000 shares in said R. R. Co. and to issue bonds and pledge taxes, to pay for the subscription." Under this act the Mayor and Aldermen completed the subscription.

Nichol and others filed a bill to enjoin the Mayor and Aldermen from issuing bonds in payment of this subscrip-

tion on the ground that the act was unconstitutional. Demurrer by defendants.

Held, the act of 1845 merely authorized the city to take stock, and the act of 1847 gives the additional power to borrow the money to pay for the stock by issuing its bonds; held, further, that the Legislature had the constitutional power to pass these acts under the twenty-ninth section of the second article. This section provides that "the General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in manner as shall be prescribed by law, and all property shall be taxed upon the principles prescribed for State taxation." The court add, at page 266: "The reason why this clause was embraced in our Constitution, those contemporaneous with its formation know to have been, that doubts had been suggested by the highest judicial tribunal in the State, as to whether the taxing power could be delegated by the Legislature to the counties and to incorporated towns, and this clause was intended to remove these doubts."

Now let it be observed:

That the acts of 1845 and 1847 were special acts limited to the *Nashville and Chattanooga road, and the latter confined to Nashville.*

Secondly, *The power to subscribe the stock was delegated to the Mayor and Aldermen without a popular vote.*

Third, The second section of the twenty-ninth article was held to confer this power on the Legislature of author-

izing a single county or town, by a special act, to subscribe for the stock and issue bonds in payment without a popular vote.

Fourth, The court say the object of this section was to get rid of the decision of Marr v. Enloe, 1 Yer., which had suggested doubts as to this power.

A careful comparison of Marr v. Enloe, 1 Yer. R.. 457, with this decision, and with the twenty-ninth section of the second article, will manifest indisputably the constitutionality of the acts now in question.

The twenty-ninth section, second article, of the Constitution of 1834, made two radical innovations on the doctrine of Marr v. Enloe. Yer. R. 457.

First. It authorized the Legislature to delegate the taxing power to the several counties and towns respectively.

Second. The Constitution of 1796 construed in Marr v. Enloe, declared, that every 100 acres of land in the State must be taxed the same amount; in other words, under the Constitution of 1796, taxation was by the acre; under the Constitution of 1834 it must be uniform and according to value. The rate for the State must be uniform and according to value throughout the State; the rate for counties and towns must be uniform and according to value throughout their respective territories.

The case shows conclusively, at p. 457, that under just such a Constitution as that of 1834 the Legislature might, if local purposes demanded it, itself, or through such

county agencies, as it might select, impose a greater rate of county tax in one county than another.

True, the 9 Hum. case does not discuss the seventh section of the eleventh article as to partial laws, but by resting the special power on the express language of the twenty-ninth section of the second article, it impliedly denies the application of this last section and declares the twenty-ninth section of the second article was incorporated into the Constitution of 1834, to meet the Marr & Enloe case, which put the constitutionality of a special act relating to ten counties on the ground of being a partial law.

In McCallie v. Mayor and Aldermen of Chattanooga, 3 Head R., 317, the facts and decision were as follows: On February 28, 1854, an act was passed by the Legislature of Tennessee by which the "Wills Valley Railroad Company, of Alabama, were authorized and permitted to extend their road from the southern line of this State, in Lookout Valley, to Chattanooga." On August 21, 1854, the city of Chattanooga, *by an ordinance of its board*, subscribed $100,000 to the stock of said Wills Valley Railroad Company. The charter of Chattanooga (Special Act of 1851, ch. 13, sec. 15), provides that "the said corporation shall have power to subscribe for stock in any railroad or turnpike company, and pay for the same with its bonds, or otherwise." McCallie filed his bill, as the owner of land in the city, to enjoin the levy and collection of the tax imposed by the corporation of Chattanooga to pay its subscription. One ground of the bill was that the subscription had not been submitted to a vote of the people. The argument of counsel is not in the reported case, but the General Improvement Act, passed in 1851, ch. 117,

authorizing any county or town to subscribe on submitting the question to a vote of the people, was in force when the Mayor and Aldermen of Chattanooga voted the subscription in August, 1854. And the argument must have been, that, as the general law required a submission of the subscription to a vote of the people, the special act was in contravention of the general act, *and was not, therefore, the law of the land.* But the court (Judge McKinney delivering the opinion), after quoting the charter, in the opinion, at the bottom of page 319 and top of 320, says at the close of the opinion, p. 322: "*The objection that the stock was not submitted to a vote of the inhabitants of the town is not well taken. The Legislature was authorized by the Constitution to confer the power directly and exclusively upon the Mayor and Aldermen;* Con., art. 2, sec. 29."

Now, we respectfully but earnestly call the attention of the court to this case. It was a direct adjudication of the very point involved in the case at bar. The special act of 1851, ch. 13, sec. 15, had conferred *on the town of Chattanooga the power to subscribe for stock in any railroad, and pay the same in its bonds, without submitting it to a vote of the people.* The general act, ch. 117, *passed subsequently at the same session, authorized any county or town to subscribe on submitting it to a vote of the people.* Yet, notwithstanding the existence of this general act, the court held that the special act, which did not require a submission to the people, was constitutional, and the subscription binding—*although only made by the Board of Mayor and Aldermen.* Let it be observed, too, that the special act delegated the authority *to the Mayor and Aldermen*, and *not to the town;* and Judge McKinney says this the Legislature

could do, under sec. 29, art. 2, holding that a delegation of the power *to the Mayor and Aldermen* was a delegation *to the town.*

In passing, we may say that the opinions of Judge McKinney are entitled to high consideration, because he was a member of the convention of 1834, and a member of the committee which presented to the convention the twenty-ninth section of the second article for their adoption. It cannot be denied, then, that these two cases settle rightfully that, under the twenty-ninth section, second article, the Legislature is authorized, by special acts limited to one or more towns, to delegate this power; and to delegate it, not to the people of such town or towns, but to their legal representatives, the mayor and aldermen, exclusive of a vote by the people. It follows inevitably that the authority of the Legislature is the same in regard to counties

An incorporated town is a public corporation, capable of exercising such powers, privileges and immunities as the Legislature may clothe it with; it has the power to contract and be contracted with, and it is created by the Legislature by special acts for the police and good government of the people within its territorial limits. Is a county at all different in its nature? True, it forms one of the civil divisions of the State, but it is also a corporation.

Judge Caruthers says, at page 687 of 1 Sneed: "For some purposes they are merely *civil divisions*, but for others they *certainly* are *corporations.* They are political, aggregate corporations, capable of exercising such powers as they may be vested with by the Legislature. Any body of per-

sons capable of acting as one man, and in a single name, fixed by law, having succession, is a corporation. The counties in our State are clothed with the powers and attributes of corporations to a sufficient extent to be able to contract and be contracted with; *to become debtor and creditor, so as to subject all the persons and property within their limits to taxation, in any mode that may be prescribed by the Legislature. And whether this be by the action of the County Court, or a vote of the people, or any other agency, can make no difference. The legislative power is not restricted or confined in this particular, except as to purpose—not as to mode. The only inquiry on this point is, What saith the law?*"

If the English language is capable of clearly expressing and conveying a legal proposition, the foregoing clause of Judge Caruthers' opinion asserts that the Legislature has the power to authorize the counties in our State to act and contract; to become debtor, so as to subject all the persons and property within their limits to taxation "*in any mode that may be prescribed by the Legislature.*" What does he mean by saying "in any mode that may be prescribed by the Legislature?" The very next sentence unmistakably expresses his meaning, thus: "*And whether this be by the action of the County Court or a vote of the people, can make no difference. The Legislature is not restricted or confined in this particular, except as to purpose,* NOT AS TO MODE. The only inquiry upon this point is, What saith the law?"

Again, the Code, sec. 402, provides that "every county is a corporation," and "the justices in the County Court assembled are the representatives of and authorized to act for it." Sections 403 to 418, et seq., make the County Court the full representative of the county; to sue and be

sued; to acquire and hold property; to *make all contracts for the county;* to impose all taxes; to erect and preserve all county buildings and property; to pay out all county moneys, etc.; to control all county roads, ferries, poor-houses—in a word, to manage all its affairs. But this Supreme Court, at its Nashville February Term, 1871, in Pope vs. Phifer et als., 3 Heiskell, 691, held this County Court to be a constitutional court, the *legal and only legal representatives of the counties as corporations.* The decision is so clear and pertinent we will quote its language. At page 691. "From this view of the case, we are led to the conclusion that the Constitution in the articles cited looked to the continued existence of this assemblage of the Justices of the Peace of the county for the performance of the duties therein imposed, as an assemblage *representing the corporate existence* of that constitutional division of our State known as a county; and that this institution must continue," etc. "There are other provisions of the constitution that we think might properly be referred to as bearing on the question:" "such as the provisions of article 2, section 29, giving the Legislature power to authorize counties and incorporated towns in this State to impose taxes for county and corporation purposes, etc., involving the idea of the action of a county as a corporate body, and as such, being represented by a body of men answering to the corporators, or representing the body upon which the duty is imposed, or to whom the privilege is granted. We have but little doubt that in these provisions it was understood that the county, as a corporation, was to be represented by the Justices in County Court assembled."

After quoting from the act of 1827, ch. 49, secs. 14 and 15, the court further say: "It will be seen here that this

body is understood to have been continued in existence after the Constitution of 1834, and that from these provisions, in all matters involving taxation of the county it is treated as the *quasi* Legislature of the county; and the principle of responsibility for their action to the people of the county, whose money they should appropriate, is carried by the same means that fixes such responsibility on the members of the Legislature—that is, a vote by yeas and nays, recorded on the minutes of the court, so that the people—the constituency of these Justices in County Court assembled—could see from the record of these proceedings who had voted for and who against each appropriation of their moneys, and hold them responsible."

Then the foregoing authorities, to-wit: Sneed, 667, Code, sec. 412, et seq., and 3 Heiskell, 315, place the counties on the same footing, as corporations, that incorporated towns stand. They also establish that the Justices in County Court are as completely, fully, and perfectly the representatives in law of the county, as are the board of mayor and aldermen of any town, and as are the board of directors of a private corporation. Indeed, the opinion in Pope vs. Phifer, 3 Heiskell Reports, places it on far higher grounds; it makes it the constitutional representative of the county, as a corporation, and that its preservation was looked to, as the body to whom the power authorized by sec. 29, art. 2, of the Constitution of 1834, should be intrusted by the Legislature when delegating it to the counties.

Assuming, then, that the counties are corporations of equal completeness and dignity with incorporated towns, we ask upon what principle can this court make a distinc-

tion, whereby the Legislature is authorized by special acts to delegate this power to one or a few towns, and that, too, to their mayor and aldermen, without a vote of the people, and yet cannot exercise the same authority to delegate this power to one or a few counties by special act, and to delegate it to their legal constitutional representatives, the County Courts, without a vote of the people? Are the rights of the people living in and constituting a county more sacred than those living in and constituting the incorporated towns? Do the mayor and aldermen of towns comprise officers more to be trusted than Justices in County Courts assembled? What provision of the Constitution warrants or gives countenance to any such distinction? All these queries must be answered in the negative.

But again, the legislative authority to delegate the power to incorporated towns, is found in the same clause and the same words of sec. 29, art. 2, as the authority to delegate it to counties. Will the court say this clause, these words, mean one thing when applied to towns, and another when applied to counties? Will it say, "Under this clause empowering the Legislature to authorize the several counties and incorporated towns to impose taxes for county and corporation purposes respectively in such manner as may be prescribed by law, means that as to towns the Legislature may by special acts delegate this power to any one or a few towns, and may intrust it to boards of mayor and aldermen without submission to a vote of the people, although a general act is in force authorizing all towns to do it on a vote of the people, but as to counties, this cannot be done; that is, the Legislature cannot by special act delegate this power to a county,

through its county court." This absurd rule must be laid down, or the court must recognize the authority of the adjudications in Nichol v. Nashville, 9 Hum., 252, and McCallie v. Chattanooga, 3 Head, 315, as settling the law as to counties, as well as towns.

But we have two adjudications sustaining the authority of the Legislature to delegate this power by special acts to a few or a single county, and this while a general law was in force.

Louisv. & Nash. R. R. Co. v. Davidson, 1 Sneed, 666; Ross v. Anderson Co., MSS. In the opinion of the Supreme Court of Tennessee, delivered by his Honor, Judge Deadrick, in the case of Wallace v. Tipton Co., the conclusion stated is, "that sec. 29, art. 2, authorizes the Legislature to delegate to the counties, not to the quorum or quarterly courts, and as the people constitute the county, it can only be valid when made dependent on their action at the ballot box." Now we confidently insist that this is a palpable mistake, and the contrary has been repeatedly held by this court.

In Hoodenpyle v. Cannon County, 7 Hum., 146, the court (Judge Reese delivering the opinion) says: "The twenty-ninth section, second article of the Constitution, provides that the General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law. In pursuance of this power the Legislature has, by various statutes, authorized and empowered the Justices of the County Courts of the several coun-

ties to exercise for county purposes this delegated power of taxation. The power itself is a portion of the fiscal or taxing power of the State, delegated, as we have said, pursuant to the Constitution, to the several counties. The agents indicated by law for the exercise of this delegated local power happen to be the Justices of the County Court, but the power itself is not judicial, and might have been *confided to any other agents*, or to *the people of the counties themselves.*"

Now, here is undeniably and most clearly a decision that the Legislature, in delegating this power under sec. 29, art. 2, to the counties, has, by various statutes, delegated it to the County Courts, and further, that the Legislature has the absolute discretion to select the agents to whom they will confide it; they may confide it to the County Courts, or to the people themselves, or to any other agents. This is directly in the teeth of the proposition that the power cannot be delegated to the Quorum or County Courts without a submission to the people; it is directly in the teeth of the proposition that the language of sec. 29, "to the county," excludes the power to delegate it to the Quorum or County Courts, or that it means the people. Judge Reese says the Legislature may confide it to the County Courts or to the people, or to any other agents. In other words, the agents to be trusted with this delegated power are not prescribed by the Constitution, but *are left entirely to the absolute discretion of the Legislature.*

In Louisville & Nashville Co. v. The County Court of Davidson et al., at page 651, Messrs. Meigs and Cooper, counsel for the railroad company, arguing, say: "The twenty-ninth section of the second article of the Constitu-

tion speaks of counties, not county courts. The corporate functions of the county, as a municipal body, must be exercised by some of the agents and servants of the county, and have been intrusted to the county courts; but, unquestionably they might be conferred on the constables, as suggested by the Circuit Judge, or upon special commissioners, or upon the people in mass. The power to tax is not political, and might have been confided to any other agents, or to the people of the counties themselves. (Citing Hoodenpyle v. Cannon County, 7 Hum., p. 146.) In that case (the counsel say) it was confided to the county court; in this case the discretion is intrusted not to the county court, but to the people, in conformity with Judge Reese's suggestion." This was in answer to the argument that the county court was a local legislature, whose levying of taxes was a matter of discretion. The answer was: "The Legislature may confide the power to any agents or servants of the county, or to the people; and the people having decided to enter into the obligation, the county court becomes imperative."

We have freely quoted from this Brief, because it so clearly shows that, as to whether the power shall be intrusted to the county court or confided to the people, is a *matter wholly and absolutely within the discretion of the Legislature.*"

The court will observe, too, that this court in that case (1 Sneed, p. 676), took exactly the same view. At the bottom of page 676 the court say: "But again, this act provides for the creation of a county debt for stock in a road, and a tax to meet it, and this is suspended on a vote of the people, and not the action of the court. The Leg-

islature, it is admitted, could do this, or it could empower the court or a corporation to do it, but cannot leave it to the people." So far it is plain the court was only stating the position of counsel, but now comes the answer of the court as follows: "What says the Constitution? The General Assembly shall have power to authorize the several counties and incorporated towns to impose taxes for county and corporation purposes respectively, in such manner as may be prescribed by law. Art. 2, sec. 29. By another section the Legislature is authorized to vest power over private and local affairs in the courts of justice. Art. 11, sec. 8. But here, in relation to the very delicate subject of taxation, the authority to impose taxes for county purposes is to be communicated to the counties, not the courts, nor to the justices, nor to the officers. And how shall this power be exercised? By what agency or instrumentality? By the county court, or circuit court, or by representatives from each civil district selected for that purpose in convention, or by the people? No. *The mode of doing it is left to the General Assembly.* The authority is to be exercised by the counties, in such manner as shall be prescribed by law. The Legislature, then, have, by the Constitution, the power to determine and direct how and in what manner these taxes may be imposed by the counties upon themselves, as well as to what extent and for what purpose. That the court might (may) have been empowered to act for the county on this subject, is no objection to the different mode or agency adopted in the act. It may certainly be said with great safety, that as the Legislature was expressly intrusted with the selection of the mode or manner of imposing the debt and tax on the county, it could not have adopted a plan more unex-

ceptionable than to refer the question directly to the tax-payers themselves."

The remark quoted by Judge Deadrick, in his opinion in Wallace v. Tipton county, from Judge Caruthers' opinion in 1 Sneed, that the delegation of power is *not to courts, but to the counties*, and which Judge Deadrick uses as authority for holding that the Legislature could not delegate the power to either the Quarterly or Quorum Courts, was not intended by Judge Caruthers in that sense at all. He was not discussing the constitutionality of the act, nor the power of the Legislature, in that part of the opinion from which the remark quoted was taken. He was discussing whether there had been a due compliance with the statutory requirements in making the subscriptions then before the court; and he said the delegation of authority was to the counties, and not to the courts; that a mere ministerial duty was imposed on the courts in those statutes, and the Quorum Courts could perform it, although only composed of three justices. He had already, in the clearest and fullest terms, declared the legislative authority to select the mode or manner or agency, to be *without limit*, and *wholly within the absolute discretion of the Legislature*, that they might delegate the power *to the County Courts, or make it dependent on a vote of the people, or on any other agency.* It is therefore impossible to believe he meant to contradict this solemn holding when he came in the same opinion to discuss a different question.

We ask attention to the decision of the Supreme Court of Tennessee, in Ross v. Anderson county, MSS. opinion by Judge Sneed. He declared *the special act* (ch. 180) of 1854, authorizing Anderson county to issue bonds in pay-

ment of its subscription to the Knoxville and Kentucky Railroad Company, valid. He also declared: "*But the Legislature having, on the 18th of February, 1854, by said ch. 180, declared said election and proceeding lawful and binding,*" etc., p. 8. "*The irregularities of that election and proceeding were cured by this subsequent legislation.*"—p. 11.

Now it is true the subscription of Anderson county was first intended to be made under the general improvement act (ch. 117) of 1852; but the issuance of bonds in payment was authorized by a *special act* (ch. 180) of 1854, *applying alone to Anderson county, and varied the mode of payment from the general law.* By the general act the county could only issue warrants on short time; *by the special act the county was empowered to issue thirty-year coupon bonds; and this without submitting the question of issuance of bonds to a vote of the people.* By this special act (ch. 180) of 1854, applying alone to Anderson county, the previous election or vote by the people was cured and declared valid, and the Supreme Court of Tennessee held that act constitutional, and that it did cure and make valid the subscription, notwithstanding irregularities in the election.

Can it be possible that a Legislature can cure a defective, irregular or void election, or vote of the people, and make the subscription valid on the county by a *subsequent special act*, and yet cannot authorize by special act a valid subscription without a vote of the people? Has the Legislature a more ample authority in passing a *curative* than a *creative act?* Is this court prepared to hold, that because of the existence of the general act (ch. 117) of 1852, (requiring counties and towns, when attempting to subscribe to a the road company under that act, to submit it to a popular

vote), the Legislature cannot, by a special act, authorize a county to subscribe without a popular vote of the county, and yet, when the popular vote is irregular and void, the Legislature can cure the subscription by a special act, dispensing with the vote? Is the curative or dispensing power greater than the creative?

In L. & N. R. R. Co. v. Davidson Co., 1 Sneed, 679, the same question arose, and at page 679, the court say: "The clause against partial and private laws is also cited, Constitution, art. 11, sec. 7. This is, if possible, more remote and inapplicable. To prove this, it will be only necessary to read it in connection with sec. 29, art. 2."

In this case the direct question was submitted to the court: "How can the Legislature, in delegating the power of taxation, under sec. 29, art. 2, to counties and towns, authorize such counties or towns, and through what agencies?"

The court decide, page 677: "The mode of doing it, whether by the County Courts, or Circuit Courts, or by representatives from each civil district selected for that purpose, or by the people, is left to the discretion of the General Assembly."

This case, as to one of the counties, involved a special act, (act of 1852, ch. 191, secs. 12 to 20,) applied to only a few counties, and varied the mode of ascertaining the popular vote, one act requiring a majority of the votes polled, while the other required a majority of the legal voters."

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Secondly. That it was absolutely in the discretion of the Legislature to delegate it to the County Court, or to the people.

In Water Co. v. Memphis, 5 Heiskell R., 495.

By a special act, passed in 1868–9, the water-works company was chartered to build a public water-works in Memphis, to supply its inhabitants and the city with water for 99 years; it is a private company; the charter grants to it the exclusive privilege of constructing and operating a water-works in Memphis for 99 years, gives the right to lay its pipes through the city, etc. The city of Memphis sought to have this charter vacated on the ground that it was unconstitutional, and violative of the seventh section against partial laws. The court replied, that the peculiar and exclusive privileges and franchises granted to this company by its charter were embraced in the first clause of sec. 7, art. 11, but, that the proviso as clearly removed charters of incorporation from the operation of the first clause. This case settles that the proviso, ("provided always, the Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good,") is an express authorization to the Legislature to grant special privileges, immunities, and exemptions, and to suspend general laws in the creation and amendment of charters of incorporation.

It is strikingly at variance with the opinion of Judge Deadrick, in the case of Wallace v. Tipton Co. Chief Justice Nicolson, in the Water-works case, does not confine his attention to the first clause of the seventh section of the eleventh article; but reads it in connection with the proviso in favor of corporations, and says, the proviso

takes corporations out of the operation of the first, but Judge Deaderick wholly omits to notice or consider the proviso at all. Without a single reason given, and although his attention was urgently challenged to this proviso, he utterly disregards the proviso, and the decisions on it, and simply announces that the acts of 1867 and 1869 are partial laws in violation of sec. 7, art. 11. So, too, when the twenty-ninth section, article second, are earnestly pressed, with the construction given to them by the Supreme Court of Tennessee, in 9 Hum. 452, 3 Head R. 317, and 1 Sneed R. 666, and by the court of which he is a member in Pope v. Phifer, and Ross v. Anderson County, Judge Deadrick wholly omits to consider that section, or to notice the construction put upon it by the ablest jurists that ever sat on our bench. On the petition for rehearing, his attention was again challenged to this "proviso" in the most emphatic manner, but he again wholly omits to notice it. So, too, when the 3 Head case is pressed, expressly deciding the point and resting on the twenty-ninth section of article second, he satisfies himself by saying it contains no discussion of the point, but it announces the facts raising the question, and then decides the point. We may truly say Judge Deaderick's opinion does not discuss the point; he simply announces his opinion without a single reason given, and wholly neglecting to discuss the proviso to the seventh section of article eleventh, and wholly neglecting to discuss the twenty-ninth section of article second.

We cited no less than twenty to thirty statutes, both before and since the act of 1852, similar in all respects to the one under discussion, some of them passed by the Legislature of 1835, which launched the Constitution of

1834; we called attention to the fact that many able lawyers, who were in the Convention of 1834, were in the Legislature of 1835 and of 1837, and passed special acts like the one under discussion; we called attention to the facts of such special acts having been passed at sessions of the Legislature for thirty-five successive years, from 1834 to 1869, and no one of them had ever been declared unconstitutional by this court. This contemporaneous practical construction, and subsequent uniform practical construction by the Legislature for nearly half a century, should, we respectfully submit, be of controlling influence, and fix the construction. On this point we ask the attention of the court to the opinion delivered by Judge Freeman in Pope v. Phifer, already cited. The rights of third persons, and proper regard for the long established practice and views of the legislative branch of government, both demand this construction now.

We will now call the attention of the Court to the decision of other courts: Under a constitution identical with ours, in Michigan, Judge Cooley, in 23 Mich., 499, said, "The power to impose such taxation should not come from nor be aided by the municipal votes. The Legislature has exactly the same power to impose the taxation without the assent of the municipalities, that it has to permit it with their assent, and the permission granted to the municipalities to vote on it was a matter of favor and not of right."

In 16 Wallace R., 667, the Supreme Court of the United States say: "A general legislative act, prescribing the mode in which counties shall issue their bonds, *is but the act of one Legislature;* and accordingly a special act giving to a county a right to issue their bonds in disregard of the

provisions of the general act, authorizes such last named issue."

"Every legislative body, unless restricted by the Consti-
"tution, may modify or abolish the acts of its predecessor.
"Whether it would be wise to do so, is a matter for legis-
"lative discretion. Unlike the decision of a court, a legis-
"lative act does not bind a subsequent Legislature."

Blomer v. Stoley, 5 McLean, 166.

It follows, therefore, that while the Legislature provided generally that any town or county might make the subscription upon submitting it to a popular vote for approval or rejection, under the act of 1852, yet as no limitation was put by the Constitution upon its power to grant special charters or requiring it to provide for such charters by general laws, that notwithstanding such general laws, the Legislature, where charters are involved, had the power under this proviso to delegate the authority to make the subscription to the Justices, or whomsoever it saw proper.

The case of McKinney v. Overton Hotel Co., 12 Heiskell, 117, is a case illustrative of this principle. Here the Legislature clearly had the right to grant such charter as it saw proper, *provided it did not violate some other constitutional provision.* It allowed the company to issue its 10 per cent bonds. This was violative of the constitutional provision which required the Legislature to pass interest laws which should be equal and uniform, and it was so determined by the Supreme Court.

So the Legislature cannot authorize corporations to carry on lotteries, for this, too, is prohibited, not by a statute, but by a constitutional provision.

Suppose, however, that interest and lotteries had not been mentioned in the Constitution. Then no one could doubt for a moment that such grants contained in a charter would not have been subject to objection under the proviso under consideration.

The fundamental principle is, that the power of the Legislature is omnipotent, unless restrictions thereon can be pointed out in the Constitution, and the case shown to come within them.

Cooley Con. Lim., p. 168, note 4.

The following decisions in Missouri, under a Constitution like ours, are in point:

Smith v. Clark Co., 54 Mo. R., 58.

The A. & R. railroad company was chartered by special act, February 3d, 1857, and organized September 13, 1865. This charter made sec. 14 of the North Missouri railroad charter of 1851 a part of its charter. This sec. 14 authorized any county along the line of said road to subscribe thereto without the sanction of a popular vote. Afterward the County Court of Clark county subscribed $200,000, payable, in county bonds, to this A. & R. railroad company. Afterward, by order of the County Court, the question of this subscription was submitted to a vote of the people, and rejected. Afterward, the County Court submitted to a vote of the people whether they would subscribe $100,000, and this also was rejected. Afterward, on the 10th of June, 1865, the County Court rescinded the original agreement by it to subscribe $200,000, and as a compromise of said agreement, issued $500,000 of Clark county bonds to said railroad company, and appointed an agent to be, and who

was at the election of said railroad officers, and voted the stocks. And the first and second instalments of the coupons were paid. Held, that the special act of 1857, authorizing the subscription without vote, was not repealed, nor affected by the general law in the Code of 1861, requiring a vote, but that the special act was constitutional and valid, and that the general prohibition is not inconsistent with a special indulgence, and the latter is not affected by the general statute—citing

37 Mo. R., 597; 38 Mo. R., 529; 47 Mo. R., 148.

Also, in State v. Green, 54 Mo. R., 540, the court held special act valid authorizing a county to subscribe without a vote, although a general law exists prohibiting without a vote.

By the Constitution of Ohio all laws of a general nature shall have a uniform operation. Held, an act authorizing a subscription by one county constitutional, notwithstanding general law.

Carr. v. Dillon, 2 Ohio St. R., 617, 618.

The article forbidding suspension of a general law by a special act was not intended to exclude special acts for municipal subdivisions of the State having peculiar local interests, or needing legislation not required elsewhere.

59 Md. R., 409. 36 Cal. R., 300.

5 Nev. R., 15 and 125. 40 Mo. R., 190, 191.

"The acts of special legislation have been so numerous of this kind, and property rights have been so often settled under them, that they cannot be rejected." This is the language of the Supreme Court of Illinois.

23 Ill. R., 207.

"The act of 1868, ch. 511, relating to roads in Pratt county alone, is not a special act, but a public local law, and not in conflict with sec. 33, art. 3, of the Constitution, as to partial laws.

29 Md. R., 516.

In Cooley's Constitutional Limitation, at the bottom of page 421, acts like ours relating to counties and towns are expressly declared not partial, and not affected by general laws or statutes on the same subjects, because the local necessities of particular counties and towns require variant legislation, *and because they are each subject as a corporation to absolute legislative control.*

"The rule (of uniformity) does not require that taxes "for the same purpose shall be imposed in different terri- "torial subdivisions at the same time. If so, a county "could not levy a tax to build a courthouse, jail, or infirm- "ary, without rendering it necessary for every other county "in the State to do the same thing, without reference to "the different circumstances of each one."

Swayne J., in Talcott v. Pine Grove, 19 Wall., 675.

In so far as relates to the powers of the counties to subscribe and pay for the stock of said company, the statute in question is not, in the sense of the Constitution, a special or partial law, but a public *local* law, as broad and general as the subject matter of the legislation required. If driven to it, we might wholly abandon the argument based upon the express grant of power as contained in the seventh section of article 11, and maintain the power of the Legislature to authorize these counties to subscribe for the stock solely upon the twenty-ninth section of the second article,

by which the Legislature is authorized to delegate the taxing power of the several counties for their respective county purposes.

A case has been recently determined by the Supreme Court of Tennessee, opinion by Judge McFarland, one of the judges who presided in the case of Wallace v. Tipton Co. This last case was decided at the September Term, 1877, in the case of Knoxville & Ohio R. R. Co. v. Hicks, and which in effect overrules the Wallace v. Tipton Co. case.

The facts are: By an act passed twenty-fifth of February, 1856, the capital stock, dividend, road and fixtures were exempt from taxation until the road paid a dividend of six per cent., and the first main question discussed was upon the power of the Legislature, under the Constitution of 1834, to grant the exemption.

The court hold as follows:

"The charter of a private corporation, when accepted, becomes a contract, that cannot be impaired by subsequent legislation, when the power to do so is not reserved. Stipulations for exemption from taxation, or for the payment of a bonus in lieu of taxation, are important elements of the contract protected by the tenth section of art. 1 of the Constitution of the United States and of the State; and the Legislature of a State has the power to bind the State by such contracts, *where that power is not denied by the Constitution.*"

"Did the Constitution of 1834 of this State, restrict the power of the Legislature in this regard? The Constitu-

tion of the State is not a grant of power; the Legislature possesses inherently all legislative power, except so far as forbidden, limited, or restricted by the Constitution."

The court expressly hold, in this case, "that under the Constitution of 1796, the Legislature had the power, and had exercised it, time and again, *of granting special privileges to corporations, in suspension of the general law*, and that, by the proviso to the seventh section of the eleventh article of the Constitution of 1834, the Legislature *intended to exclude the idea that the first clause against the granting of special privileges, immunities or exemptions, was intended to limit the power of the Legislature in regard to granting charters of incorporation.*"

This opinion is filed herewith as exhibit H.

Again, as we have already shown, the Legislature, from 1834 to 1870, have so construed this section by practical acts; and contemporaneous and practical construction is entitled to a controlling weight in fixing the judicial construction.

Cooley's Con. Lim., p. 67–70.

We respectfully insist that the construction placed upon these constitutional provisions by the legislative, executive and judicial departments of Tennessee, from the passage of the Constitution of 1834, to the Constitution of 1870, should have controlling weight with the court in its decision upon this point.

In Stewart v. Laird, 1 Cranch, 299, the court say, in passing upon the rights of the Supreme Judges to sit as Circuit Judges: "It is sufficient to observe that practice

and the acquiescence under it for several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature." "This practical exposition is too strong to be controlled."

In Martin v. Hunter, 1 Wheaton, 351, Judge Story says: "This weight of contemporaneous exposition by all parties, this acquiescence by enlightened State courts, and these judicial decisions of the Supreme Court, through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken."

In Cohen v. Virginia, 6 Wheaton, 418, Ch. J. Marshall said: "Great weight has always been attached, and very rightfully attached to contemporaneous exposition.

In Ogden v. Saunders, 12 Wheaton, 290, Justice Johnston assigns the following reasons why it should have so much weight: "It proceeds upon the presumption that the contemporaries of the Constitution have claims to our deference on the question of right because they had the best opportunity of informing themselves from the framers of the Constitution, and of the sense put upon it by the people when it was adopted by them."

To same effect see

2 Mass., 478; 2 Gill. 487; 4 T. B. Munroe, 42;
19 Ark., 369; and
Cooley on Contemporaneous and Practical Construction, 67.

Then here is a case presented where for a period from the foundation of the State government, indeed when a part of the old North State, all the departments of government, legislative, executive and judicial, have given to these constitutional provisions one uniform interpretation. All have acted upon them, and the enterprises of the State have been built up on the faith of their validity and binding force, and in the particular case at bar hundreds of thousands of dollars have been invested by innocent parties upon the faith of an adherence to these fixed principles, as thus determined, and we rest assured that at this late day, when the Constitution of 1834 has passed away, that the court will not disturb rights of property acquired upon the faith of such prior practical construction by all the branches of the government, especially where no sound reason is shown for the oscillating opinion of the last court which has passed upon it, especially where the reasoning of said court is not satisfactory or sound, and its own decisions are not in harmony with each other, and are in conflict with all previous adjudications on the same subject.

The objection made to the action of the County Court in making the subscription, that it was made not at a regular quarterly court, is set at rest by a recent decision of the Supreme Court of Tennessee, where it is held that the Legislature may fix any monthly term so the requisite number of Justices are present.

L. & N. R. R. Co. v. Davidson Co., 8 Heiskell, 287.

Another objection urged is that the act referred the question to justices in commission. Now, our reply is, that no justice could act but a justice in commission. The

commission from the Governor is the evidence of the election of the justice and his proper qualification, and it can not be attacked in a collateral way or proceeding. When a justice assumed to act, his contestant or any citizen could institute a proceeding in the nature of a quo-warranto to vacate his office, but without such proceeding, his commission is as absolute a verity as a judgment inter partes. "When a judge, justice of the peace, or other officer is in fact exercising the functions of his office, under a commission from the Governor, the validity of his acts cannot be questioned. All such questions are closed by the Governor's commission."

Moore v. State, 5 Sneed R., 510.

Another objection was that the bonds are dated January 1st, 1869, whereas one of the acts of the Legislature on which they are based was not passed until February 12th, 1869. Our reply is, that the bonds were not in fact issued until after the unanimous action of the quarterly court at its regular July term, 1869, in favor of perfecting the subscription and issuing the bonds, and that not until July 21st, 1869, under their order were the bonds issued. The record shows this fact.

Another objection was, that the bonds had longer to run to maturity than the general act allowed. This was to the advantage of the taxpayers and they can't make any objection to it. "If it were a departure from the act, it would not lie in the mouth of the party benefited to complain." This was the answer of the Supreme Court to a like objection in 1 Sneed R., at p. 683.

Again, as we understand it, the rule adopted by this court, and by all other subordinate Federal tribunals is, that they will follow the rulings of the Supreme Courts of the several States upon the construction of their own legislative acts and constitutions in so far as they are harmonous, sustained by reason or authority, and not violative of all truth, law and justice; but they refuse to follow the oscillating and unsatisfactory opinions rendered in conflict with previous well adjudicated opinions, and especially where to follow them would affect rules and rights of property acquired in good faith and predicated upon such former adjudications and interpretations, legislative, executive and judicial.

See Gelpeke v. City of Dubuque, 1 Wallace, 175.

In Olcott v. Supervisors, 16 Wallace, 690, Strong, J., lays down the rule as follows: "This court has always ruled that if a contract when made was valid under the Constitution and laws of the State, *as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the Legislature or judiciary will be regarded by this court as establishing its invalidity*," citing

Havemeyer v. Iowa City, 3 Wallace, 294.
Gelpeke v. City of Dubuque, 1 Wallace, 175.
Ohio Life and Trust Co. v. Debolt, 16 Howard, 432.

In township of Pine Grove v. Talcott, 19 Wallace, 677, Swayne, J., says: "It is insisted that the invalidity of the "statute has been determined by two judgments of the "Supreme Court of Michigan, and that we are bound to "follow those adjudications. We have examined these "cases with care.

"With all respect for the eminent tribunal by which the "judgments were pronounced, we must be permitted to "say that they are not satistactory to our mind.

"We think the dissenting opinion in the one first de- "cided unanswered. Similar laws have been passed in "twenty-one States. In all of them but two it is believed "their validity has been sustained by the highest local "courts. It is not easy to resist such a current of reason "and authority. The question before us belongs to the "domain of general jurisprudence. In this class of cases "this court is not bound by the judgment of the courts "where the cases arise. It must hear and determine for "itself. Here commercial securities are involved.

"When the bonds were issued there had been no author- "itative intimation from any quarter that such statutes "were invalid. The Legislature affirmed their validity in "every act by an implication equivalent in effect to an "express declaration. And during the period covered by "their enactment neither of the other departments of the "government of the State lifted its voice against them. "The acquiescence was universal.

"The national Constitution forbids the States to pass "laws impairing the obligations of contracts. In cases "properly brought before us *that end can be* accomplished "unwarrantably no more by judicial decision than by leg- "islation."

Upon questions of commercial security, the Federal Courts are not bound by State decisions.

Oates v. National Bank, 10 Otto, 246, and cases there cited.

At the date, then, of the subscription and the issue of the bonds in question, in July, 1869, the question of the authority of the Legislature to issue these bonds, in the mode adopted, had never been doubted since the Constitution of 1834 went into effect. In fact, such mode had been expressly decided to be proper in every case adjudged by the Supreme Court of Tennessee, prior to their issuance.

Nichol v. Nashville, 9 Hum. R., 222.
McCallie v. Chattanooga, 3 Head R., 357.
Louisv. & Nash. R. R. v. Davidson Co., 1 Sneed, 116.
Ross v. Anderson County, MS.
Water Co. v. Memphis, 3 Heiskell, 496.

Now the case of Wallace v. Tipton Co., decided after these bonds were issued and sold, in a cause where the county and taxpayers alone were parties, *no bondholder being before the court*, is the only authority against the interpretation so uniformly given to this provision, through a long series of years, by every department of the State government, and this decision is in spirit in direct conflict with the cases of Ross v. Anderson Co., & Knoville & Ohio R. R. Co. v. Hicks, was decided by the court composed of the same members who decided the Wallace v. Tipton Co. case, and said decision is also in conflict with the Missouri decisions hereinbefore referred to, and also the case in 16 Wallace R., 667, thus putting this case clearly within the principle that where the decisions of a State court are variable and inconsistent, that this court will follow them only in so far as they appear to be in keeping with sound law and honorable dealings.

Talcott v. Pine Grove, 19 Wallace, 677, and cases there cited.

In 3d B. J. Lea, Tenn. R., 124, Mathews v. Blount County, decided A. D. 1879, opinion by Turney, J., the court held, that a bill in equity by taxpayers against a county and its justices of the peace, seeking to enjoin the levy and collection of taxes to satisfy county bonds issued to pay for stock subscribed by the county in a railroad company, on the ground that bonds were void, could not be maintained, for the reason that the bondholders were not before the court.

It therefore appears, not only that the principle of the decision in Wallace v. Tipton County is at war with every preceding and succeeding decision of the same court, but the case itself is now held by that same court to have been fatally defective for want of jurisdiction of the bondholders.

Conceding the fact to be that Tipton county had the power to make the subscriptions and issue the bonds in controversy, prior to the adoption of the Constitution in 1870, and in fact made the subscription prior to that time, which cannot be controverted, the issuance of the bonds afterward was valid, and not affected by that Constitution.

County of Moultrie v. Rockingham City Bank, 2 Otto, 631.

County of Randolph v. Port, 3 Otto, 512.

County of Callaway, 3 Otto, 573.

The fact that there was a consolidation of the Mississippi River Railroad Company with the Paducah and Memphis Railroad Company, by authority of law, and the bonds were issued to the consolidated road, does not affect their validity—the Record showing, as it does, the consent and ratifi-

cation of the consolidation by plaintiff in error. See Record, p. 41.

Nugent v. Supervisors of Putnam Co. Sup. Court of U. S., Oct. Term, 1873. 19 Wallace, 248, and case there cited.

To show what laws had been declared by the courts of Tennessee to be unconstitutional, because partial, a series of Tennessee cases were cited and relied on by the counsel for the defence, which we will review, to show they are distinguishable in principle from and cannot be relied on to sustain the defence in this case.

2 Yerg. R., 599. State Bank v. Cooper.

By an act of 1829, ch. 95, the officers of the Bank of Tennessee, their sureties, and customers of the bank, who had overchecked, were liable to be called before a special tribunal to answer and account. Held unconstitutional, as partial, and not the law of the land under art. 1, sec. 8. It operated directly on individuals, taking away the right of trial by jury, the right of being proceeded against according to the common law, and the right of appeal, all of which rights were secured by express provision of the Constitution, sec. 9, Bill of Rights and art. 1, sec 8.

In this case the law or charter took away the right of trial by jury, the right to be proceeded against according to the common law, and the right of appeal, all secured by express and positive provisions of the Constitution, other than sec. 7 of art. 11.

2 Yerg. R., 260. Vanzant v. Wadell.

Ch. 191, of act of 1859, sec. 9, empowered the bank to

make its debtors pay on garnishment. Decision same as above.

2 Yer. R., 554. Walley's Heirs v. Kennedy.

Ch. 39 of act of 1827, authorized the courts to dismiss suits pending which were champertous. This suit was commenced August 27, 1827. This law, by a peculiar remedy applicable to certain suits, took away the rights of these suitors. Held a judicial act, and unconstitutional.

1 Yer. R., 452. Marr v. Enloe.

The act of 1827 authorized the county courts of ten counties (naming them) to lay and collect a special tax in these ten counties for the improvement of their rivers. The Constitution of 1796 required taxes on land to be equal and uniform in such manner that no one hundred acres shall be taxed higher than another in the State. Const. 1796, art. 1, sec. 26.

1 Meigs Dig., p. 320.

The decision denies the power of the Legislature to delegate the taxing powers to counties at all; and that the act was partial. Clearly holding this, because the Constitution, as above shown, required all taxes to be uniform throughout the State.

4 Yer. R., 209. Tate v. Bell.

The act in question here, required a judgment by *sci. fa.* to be revived not in the name of the administrator of the decedent, but in the name of the administrator of the beneficial owner of the judgment. Held a judicial act, and therefore unconstitutional and void.

5 Yer. R., 322, 3. Officer v. Young.

This was an act directing a suit then pending in the name of a deceased plaintiff to be revived in the name of one Young, who was not the personal representative of the plaintiff. Held a judicial act, divesting the rights of one individual and vesting them in another, thus violating sec. 6 of art. 1 of Constitution of 1796.

6 Yer. R., 119. Fisher's negroes v. Dobbs.

An act directing a court to dismiss a particular class of cases. Held a judicial act, and violative of the seventeenth section of the bill of rights, which provides that the courts shall be open, etc.

10 Yer. R., 59–80. Perry v. Jones.

This act authorized a guardian to sell the lands of infant wards to pay their ancestors' debts. Held unconstitutional, it was a judicial act, taking the property of one person and giving it to another.

5 Heiskell R., 691. Pope v. Phifer.

An act authorizing the Governor in a few counties to appoint five commissioners to assume the functions of the county court. Held unconstitutional in this: The Constitution of 1834 recognizes the county court composed of justices of the peace as a constitutional court. The Legislature could not therefore abolish this court thus composed and substitute a body of commissioners appointed by the Governor, and if this be not so, to authorize this as to a few counties is not the law of the land.

3 Hum. R., 490. Budd v. State.

A section in the charter of the Union Bank made the embezzlement of its funds, or the making of false entries

in its books by one of its officers or agents a felony. Held this section creating a felony cannot be considered a part of the charter contract, but a special law creating a crime against particular individuals, hence not a law of the land, but a partial law creating a felony, hence void.

2 Sneed R., 180. Dearmon v. Alexandria.

An act creating a penal offence against a single sheriff held not the law of the land.

The foregoing cases do not touch the question before the court at all:

Outside of the constitutional validity of the statutes under which these bonds were issued, this case involves another question.

Defendant insists the bonds are void for fraud and bribery practiced by the Mississippi River Railroad Company in procuring the members of the County Court to vote for the subscription at the February term, 1869, and that the justices now making this defence did not discover this fraudulent conduct until 1875.

Our reply is three-fold:

First, that the plaintiff below is a bona fide holder, in due course of trade, i.e., before due, and for value, and without notice.

These bonds were issued under the orders of a full Quarterly Court in July, 1869; they matured, according to their face, on the first of January, 1873.

In October, 1871, while the Mississippi River R. R. Co. still held these bonds, said company, by a resolution of its board of directors, offered to Tipton county, that said company would grant an extension of time for the payment of said bonds and interest to ten years from the date of said bonds, in ten annual instalments, on condition that the County Court of Tipton should immediately levy a tax, and proceed to collect the same, and so do every year, promptly paying over the amount annually due under this agreement, until the whole should be paid; and on failure to make any one of such annual payments, the remaining bonds to become due according to their original terms.

The County Court accepted this proposal at its regular October quarterly term, 1871, and continued to levy the tax, collect and pay it over annually, through the years 1871, 1872, 1873, and 1874.

See Record, pp. 37 and 38.

On the 15th of March, 1873, two months after the bonds were due, according to their face, but before they were due under the agreement of October, 1871, the plaintiff below took the bonds sued on in this case in payment for three engines sold and delivered to the railroad company, *and* this without notice of any fraud.

See Record, pp. 40, 41, 42.

We insist that this agreed extension put the bonds on the footing of negotiable paper not due until the extension expired, or the county had failed to make the agreed annual payment. And, as the plaintiff below bought during the period of this extension, and while the County Court was in the regular performance of the stipulation to

make the annual payments, said plaintiff is an innocent purchaser for value before maturity without notice and not liable to said defence, of fraud between the original parties.

Consent by an indorser to an extension of time for the payment of a note between maker and payee, implies a waiver of demand and notice at the original maturity of the note.

Walker v. Graham, 21 La. Ann., 209.

Harden et al. v. Wolf et al., 2 Ind., 31.

On February 2, 1841, Harden et al. made their note, whereby they promised to pay to the order of John Ryder on November 25, 1841, $550.00, with interest from date; that on November 29, 1841, the makers agreed in writing on the back of the note to pay interest at the rate of 10 per cent.

Held at page 32: "The new agreement amounted to the same thing, in effect, as if the note had been cancelled and a new note had been executed bearing 10 per cent. interest." To the same effect see Beckner v. Carey, Ex'r, 44 Ind., 89.

Secondly. We insist that the Record shows that, in October, 1871, the County Court of Tipton county was informed, by the Paducah and Gulf R. R. company, through its president, that with a completed road from Paducah, Ky., to Troy, Tenn., worth $1,000,000, and absolutely free of debt, this Paducah and Gulf railroad company was about to, and would, consolidate with the Mississippi River railroad company, if these county bonds were valid debts and would be paid, and if this County Court adopted and agreed to the proposed extension set forth in the resolution of said

Mississippi River railroad company; said County Court of Tipton, being so informed, did agree to and adopt said resolution, and levied the tax under it; and, induced thereby, the Paducah and Gulf railroad company did consolidate with the Mississippi River railroad company, in 1871, and the consolidated company took said bonds under the consolidation. The Record further shows that the officers of Tipton county, in the convention of the stockholders of the Mississippi River railroad company, voted the $200,000 of stock in favor of the consolidation. The consolidation was effected. Then the county surrendered its certificate of stock in the Mississippi River railroad company, and accepted, in lieu, a certificate for the like amount of stock in the consolidated company, the Paducah and Memphis railroad company.

Record, pp. 36, 40, 41, 42.

This conduct was a representation of the most solemn and avowed character, by the appellant, to one about to purchase said bonds, that they were good, valid, and binding, whereby this third party was induced to purchase said bonds, and, hence, they are binding on said county, both in the hands of such purchaser and of its assignee, the defendant in error.

And this is so, although the County Court was, at the time of this conduct, ignorant of the original infirmities now set up.

One who has bought a note after due, under assurances of its validity from the maker, may recover from the maker the full amount, although it was bought at a discount, and was invalid in the hands of the payee.

Tobey v. Chipman, 13 Allen, 123.

1 Greenlf. on Evidence, sec. 207, 8, reads as follows:

"Admissions, whether of law or fact, which have been acted on by others, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. *It is of no importance whether they were made in express language to the person himself, or implied from the open and general conduct of the party, etc., 207.*"

5 Miss. (6 How.) R., 479., A. D., 1840. Land's Adm'r v. Lacoste et al. Opinion by Ch. J. Sharkey.

Land, in 1836, made three notes to Marshall for $18,000 each, due 1st of March, 1838, 1st March, 1839, and 1st March, 1840, for a tract of land and some slaves, and gave a deed of trust on the same property to secure the notes. He paid the first note. Carmichael, before the second note fell due, being about to buy the second and third notes, inquired of Land, the maker, if he would pay them at maturity; he replied there was a defect of title, but he had no doubt the vendor would cure it. Afterwards Land made some arrangement with Marshall, the vendor, as to this defect, and then informed Carmichael the defect was cured and the notes would be paid. Thereupon Carmichael took the notes in part security for a debt due from Marshall to Carmichael. When the second note fell due, Land paid $10,000 on it and died. Lacoste, the trustee, on the maturity of the third note, advertised the trust property for sale, to satisfy the balance of the second and the third note. Land's administrator filed a bill to enjoin the sale, for the reason that the defect, as a matter of fact, had not been cured. The relief was refused, the court saying Land assured the assignee that the difficulty was obviated,

and he would make no defence against them, in consequence of which promise the assignment of the note was taken; whatever equity Land might have had against Marshall was certainly waived as to the assignee. Such a promise to one about to take an assignment is binding on the party making it, and a waiver of his equity, even without further knowledge of the failure of consideration than such as the party must have had by the making of the contract, and knowing the consideration for which the notes were given. The excuse of ignorance of consideration cannot be urged for Land.

5 Miss. R. (6 How.), 720-1-2-3. A. D. 1841. Hamer v. Johnston et al. Ch. J. Sharkey, opinion:

The doctrine of this case is exactly as above. Hamer made and gave Davis his two promissory notes for $9669, as the price for land, for which Davis executed his title bond to Hamer. Davis had no title to the land, but Hamer was ignorant of this. Pierce being about to buy the notes of Davis, before due, asked Hamer if the notes were good, and would be punctually paid when they fell due. Hamer assured him they would. Pierce, on this assurance, bought the notes and paid eighteen slaves for them. Afterward Pierce sold and assigned the notes to Johnson, telling him of Hamer's assurance. Johnson, the second assignee, sued Hamer on the notes. The latter defended on the ground of total failure of title to the land in Davis. Johnson replied the above assurance to Pierce by Hamer and his purchase from Pierce. Hamer proved his ignorance of the defect of title when he made the assurance to Pierce. Court held Hamer estopped by the assurance, as Pierce

and Johnston acted on it, notwithstanding Hamer's ignorance of the defect.

"If a purchaser make the proper inquiry of the maker, who is supposed by the law to know the consideration and the defence, and he states that the money will be paid, this is calculated to inspire confidence, and justice requires that such representation shall estop him from resisting payment on the ground of failure of consideration. The policy is to encourage, rather than check the negotiability of mercantile paper. Its circulation would be greatly embarrassed if the maker be permitted, in the face of his assurances to the contrary, to go into the consideration against an innocent holder, who purchased honestly, relying on the statement of the maker that it would be paid." p. 723.

2 Yeates (Penn.) R., 541. A. D. 1800. Carnes v. Field. Opinion by Yeates, J.

Field made a bond for 282*l.* 5*s.* 4½*d.* to Carnes, part price for land assured by title bond. Carnes assigned this bond for value before due to Joshua R. Bond, who, before he bought the bond, inquired of Field, the obligor, if the bond would be paid at maturity. Field said it would. It was discovered before the bond fell due that Carnes had no title to the land. Held no defence against the assignee. The court say, at p. 543: "Where the obligor represents the money thereon as justly due, to a person desirous of taking an assignment, and engages to pay the same, in faith and confidence whereof the assignment is procured, the former takes on himself the risk of the adequacy of the consideration and the fairness of the original trans-

action, and relinquishes any objections he might otherwise have on those grounds. *Such conduct is virtually a new contract, and forms an exception to the general rule.*"

1 Penn. R., 24. A. D. 1829. Elliott for use of Stanard v. Callan. Opinion by Smith, J.

Callan executed his bill single to Elliott for $336.36, as the price for a town lot, dated March 6, 1820, due July 1, 1822. Title to the lot failed by reason of a prior mortgage given by Elliott to his vendor, but this defect was not known to Callan. At a time before the bill single fell due, Elliott assigned the bond to Stanard in payment and absolute release of certain debts of Elliott. Before Stanard would accept the assignment he saw Callan, informed him of the contemplated assignment, and asked him if he would pay it. Callan said he had no objections to the assignment and would pay the bond.

The court held defendant estopped to set up this defence against the assignee, Stanard, saying, at page 29: "If the assignee previous to the assignment applies to the obligor, informs him he is about to take an assignment of the bond, and inquires of him if the money the bond calls for is due, and the obligor declares it is, he is estopped from denying it afterwards; for the obligor by such a similar declaration promotes and encourages the assignment, and thereby precludes himself from the benefit of the right he would have had against the bond originally. His admissions operate virtually *as a new contract between himself and the assignee.*"

16 Sergt. & Rawle R., 18, A. D. 1827, opinion by Rogers, J.

Wenner et al. executed a bond, April 15, 1815, to pay $137.50 on 22d April, 1819, in part for a tract of land, to

be conveyed free of all incumbrances, by the payee in the bond, McMullen. Before the note fell due, the payee offered to sell the bond to one Fox. Before buying, Fox sent his son with McMullen to Wenner to inquire if he objected to the assignment, and would pay the bond at maturity. Wenner said he did not object, and would pay it. Young Fox returned home and informed his father what Wenner said; this he did in the hearing of Ann Fox, daughter of old Fox; she thereupon bought the bond, and had it assigned to her. The land was fatally incumbered. The obligor sets this up as a defence to a suit on the bond by the assignee, Ann, and her husband, Ruby. The court rejected this defence, saying, at page 20, "If the assignee call on the obligor, and inform him he is about to take an assignment of his bond, and the obligor acknowledge that it is due, without any allegation of defence, he shall not be permitted to take defence against the assignee; and this whether his silence proceed from ignorance or design. It would be most inequitable and unjust that he should; because, if any loss afterward occur, it arises from the negligence or folly of the obligor, and not the default of the assignee, who has taken every pains to inform himself of the real situation of the parties; if any injury accrue, it is right that he who causes it should bear the loss. The cases all go upon the ground that the assignee has acted with good faith, and without notice of any defect of title or valid defence, and with a wish not to ensnare the obligor, but to protect himself. As bonds are an article of commerce, and are made transferable, equitably and expressly by an act of assembly, it would be legalizing fraud to hold any other doctrine."

The court hold Ann Fox, to whom the representation

was communicated, as equally protected by the principle, as if the obligor had communicated with her as the proposed purchaser.

1 Wash. (Va.) R., 296, A. D., 1793. Buckner v. Smith. Lyons, J.

An assurance of payment to one who was about to take an assignment of a bond was held to be binding, although the bond had been given for a gaming consideration, and was absolutely void by statute.

Same case is reported in Hamer v. Johnston, 1 Smedes & M. Ch. R., 563.

1 Dan. Negotiable Instruments, 859.

"There are some cases in which defences which would avoid the instrument in any one's hands, are rendered unavailable by his own conduct, cases in which, to use the legal phrase, he is estopped from pleading the particular defence which he endeavors to set up. Thus, if a person who is negotiating with the payee or endorsee of a note for the purchase of it, inquire concerning its validity, of the maker, and the latter assure him that the note is good; that he has no defence against it; that it is good business paper, or that it is all right, and will be paid, the maker cannot afterwards plead that it was usurious or otherwise illegal. His mouth is closed by his previous representations, and the law will not assist him to lead another into a pitfall, and then make him a scapegoat for himself, and so if the holder purchases the note with the defendant's knowledge and consent, it has been held that the latter cannot set up prior payment or other defence against it."

To same effect see Davis v. Thomas, 5 Leigh Va. R. 1
Brooks v. Martin, 43 Ala., 360.

In Lynch v. Kennedy, 34 N. Y., 152, Porter, J. says:

"It was affirmatively proven that the plaintiff was a bona "fide holder of the note, and that he purchased it on the "faith of the defendant's written statement, that it was "business paper, and that it would be paid at maturity. "It was immaterial, therefore, whether any defence existed "between the original parties."

Where a forged note is on the market, and a party desiring to buy asks the alleged maker, and he answers it will be paid, and the purchase is then made, the maker is estopped to make the defence of forgery.

Court v. DeWolf, 1 Rhode I., 393.

Where one purchasing a note asks the maker if he has any defence and he replies no, the estoppel arising on the foregoing facts is available, and runs with the paper into the hands of any subsequent purchaser.

Rose v. Hurley, 39 Ind., 82.

McCabe v. Rainey, 32 Ind., 312.

If the party who transferred the instrument to the holder acquired the note before maturity and was himself unaffected by any infirmity in it, the holder acquires as good a title as he held, although it were overdue and dishonored at the time of transfer.

1 Dan. Neg. In., secs. 726–803.

In Cromwell v. County of Sac, 96 U. S. R., p. 59, Field, J., holds that "Whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established and its holder can transfer it to others with the like immunity.

His own title and right would be impaired if any restrictions were placed upon his power of disposition."

Thirdly. There is another proposition involved in the case that to our mind is manifestly in our favor: that is, a positive ratification and estoppel. Conceding that the power to make the subscription existed under the Constitution of 1834, then whatever may have been the frauds practiced in the inception of the matter, and the making of the subscription, the county, by its subsequent conduct in inducing the company to build its road, and accepting the benefits thereof, and voting for the consolidation, levying and collecting a tax, and paying a part of its bonds and coupons, through a series of years, from 1869 to 1874, and taking, voting and retaining the $200,000 of stock, has ratified the subscription originally made, and are bound thereby. The Record shows all these facts, and in addition that the Paducah & Gulf Railroad, with one million dollars, and out of debt, was induced to consolidate alone upon the representations that Tipton county would pay its subscription, and that so assured, it made the consolidation, and since that time has expended about half a million dollars in Tipton county, and the road has been built from Memphis to Covington, 37 miles; 21 miles of which is in Tipton county, and, upon same, trains are daily running; and the subscription represented by bonds, so agreed to be paid, was hypothecated and sold in the open market, and the defendant in error furnished locomotives for those now sued upon.

See Record, 40, 41, 42.

This was a complete ratification and estoppel.

Abbott's Digest of Corp., p. 675, secs. 5, 6, 7, 9.

1 Dillon Mun. Corp., sec. 385 and cases cited.

Bigelow on Estoppel, 464, 5, 6.

In Sedgwick on Statutory and Constitutional Law, page 90, the following principle of estoppel is laid down:

"It must be further borne in mind, that the invalidity of "contracts made in violation of statutes is subject to the "equitable exception, that although a corporation in "making a contract acts in disagreement with its charter, "where it is a simple question of capacity or authority to "contract, arising either on a question of regularity of "organization or of power conferred by the charter, a "party who has had the benefit of the agreement cannot "be permitted in an action founded on it to question its "validity. It would be in the highest degree inequitable "and unjust to permit the defendant to repudiate a con-"tract, the fruit of which he retains."

Cited and approved in Township of Pine Grove v. Talcott, 19 Wallace, 679. (See authorities there cited.)

The taking of stock and voting it, and levy and collection of taxes to pay the subscription or bonds issued therefor, estop the county from denying its liability, assuming it had the right to subscribe.

Nugent v. Supervisors of Putnam County, Supreme Court of U. S., 19 Wallace, 241.

But it is objected, that no act of ratification could be effectual after 1870, as the Constitution of the State was then amended, and the power of the county courts to

impose such burdens made to depend on a popular vote and a majority of two-thirds.

We reply, the action of the Quarterly Court at its July term, 1869, fully ratified the subscription. Secondly, the Constitution of 1870 does not, in terms or spirit, refer to subscriptions previously made, but expressly refers to subscriptions to be taken after its adoption. It left the county courts in full control of all previously made subscriptions and debts for them.

See 8 Ohio State R., 394.
11 Ohio State R., 25.
41 Missouri R., 457.
44 Missouri R., 553.
51 Missouri R., 531.
54 Missouri R., 58 to 67.

In conclusion, we ask the attention of the court to the fact that the defence does not rest upon any fraud going to or affecting the consideration. No failure of consideration is set up. The county received and has continued to hold the stock up to this time. Not only the $200,000 subscribed was expended on this road in Tipton county, but $300,000 more. Not until the work had been progressing more than four years, and was complete to the county seat, and the cars running, was any objection made, and then it was and is wholly confined to the mode of execution.

We quote the language of the Supreme Court of the United States, as follows: "The taxpayers saw the large expenditures, and yet took no steps to arrest them. Not until the works were completed, and the securities had

passed into the hands of bona fide purchasers, did they move in the matter. If they had been incited to action as soon as the contract was made, they would have saved a heavy debt, and innocent persons would not have suffered."

22 Wallace R., 68. A. D. 1874. Ritchie v. Franklin county.

We file the copies of statutes and manuscript opinions referred to in this Brief, as Exhibits hereto.

HUMES & POSTON,
S. P. WALKER,
Attorneys for Defendants in Error.

EXHIBIT "A."

Martin's North Carolina Digest, p. 26. A special act, ch. 5, passed August, 1720, erecting that part of Chowan precinct of Albemarle county west of Chowan river into a new precinct, called Bertie precinct.

p. 27. Act of August, 1720, ch. 8, authorizing and empowering the justices of each precinct to purchase sites for courthouses in each precinct, have the courthouses built, and raise the money to pay for the same by a special poll tax on each of the inhabitants of the respective precincts. Sec. 6 designates the sites for seven precincts.

p. 34. Act of November 24, 1729, ch. 3 makes Hyde precinct of Albemarle county separate from Beaufort precinct, and authorizing the justices of Hyde to purchase a site, build a courthouse, and lay and collect a tax of ten shillings on every poll in Hyde to pay for the same.

p. 38, 9. Act of 1734, ch. 8, special act establishes Onslow and Bladen precincts, and authorizing the justices in each to purchase sites, build courthouses and prisons, and pay for the same by a special tax.

p. 49. Act of March 6, 1738, ch. 3, sec. 22, providing that from that date the several precincts of the province of North Carolina should be called counties.

p. 48. Act of April 4, 1741, ch. 7, secs. 2 to 7, creating Edgcomb county, and authorizing its justices to buy county sites, to erect courthouse, prison and stocks, and levy special tax to pay for the same.

p. 50. Act of 1741, ch. 9, ascertains the boundaries of Tyrell, Beaufort and Edgcomb counties.

p. 56. Act 1741, ch. 18, that the justices in all and every county where there is no suitable provision already made, shall have power to buy county site, erect courthouse, and build prison and levy special tax to pay the same.

p. 67. Act of 1741, ch. 1, sec. 2, erecting a part of Bertie county into the new county of Northampton, giving to the new county the same powers as the old ones.

p. 68. Act of 1743, ch. 3, empowering the justices of Beaufort county to build two substantial warehouses for the use of the people, to be paid for by a tax.

p. 68. Act of 1743, ch. 7, authorizing the county of Bertie to erect courthouse, prison and stocks, and pay for the same by levying a tax.

p. 71. Act of 1745, ch. 8, enlarging the boundaries of Hyde county.

p. 73. Act of 1746, ch. 2, erecting Johnson county out of a part of Craven county, authorizing its county court to erect courthouse, etc., and pay for same by a tax.

p. 73. Act of 1746, ch. 3, erecting Granville county out of part of Edgcomb.

p. 77. Act of 1748, ch. 5, ascertaining the boundaries between Tyrell, Edgcomb and Beaufort.

p. 80. Act of 1748, ch. 3, laying a tax on Granville county and appointing commissioners to complete public buildings.

p. 80. Act of 1748, ch. 9, altering the time for holding the courts of Hanover county.

p. 82. Act of 1748, ch. 1, fixing place for holding the county court of Granville, and for building courthouse, &c.

p. 94. Act of 1749, ch. 2, erecting Anson county out of part of Bladen, with power to build courthouse, &c.

p. 95. Act of 1849, ch. 4, authorizes the justices of each

county court to purchase certain law books for the use of the county, and lay special tax to pay for the same.

p. 97. An act to appoint inspectors in New Hanover county.

p. 100, act of 1751, ch. 10, empowering the justices of Johnston county to divide it into districts, and to appoint commissioners for the roads.

p. 101. Act of 1752, ch. 3, appointing treasurer for nine counties by name.

p. 101. Act of 1752, ch. 4, same for Hanover county.

p. 101. Act of 1752, ch. 6, creating Orange county.

p. 105. Act of 1753, ch. 7, creating Brown county.

p. 105. Act of 1753, ch. 8, changing boundaries of Orange county.

p. 111. Act of 1754, ch. 6, to empower the justice of Craven county to sell the lot of land in Newburn, whereon the courthouse, etc., are.

p. 111. Act of 1854, ch. 11, to appoint a place for holding county court at Duplin and to build public buildings.

p. 111. *ib.* ch. 12, same for Orange county.

p. 116. Act of 1756, ch. 11, to ascertain a proper place for building courthouse, prison, pillory, and stocks for Beaufort county.

same, ch. 12, same for Onslow county.

same, ch. 13, to create Wachovia county.

p. 122. Act of 1756, ch. 5, special acts as to 5 separate counties.

p. 124. Act of 1757, ch. 9, adding part of Beaufort county to Craven county.

p. 127. Act of 1758, ch. 12, creates Dobbs county out of a part of Johnston.

ib. ch. 13, creates Halifax county out of a part of Edgcomb.

p. 130. Act of 1759, ch. 4, creates Hertford county.

p. 131. Act of 1759, ch. 11, to establish warehouses for the inspection of tobacco in Dobbs county.

p. 136. Act of 1760, ch. 3, creates Pitt county.

p. 136. Act of 1760, ch. 5, changes time of holding inferior courts of pleas and quarter sessions for the county of Chowan.

p. 140. Act of 1762, ch. 11, adding part of Orange county to Johnston county.

p. 140. Act of 1762, ch. 6, to empower the court of pleas and quarter sessions to levy a tax to pay persons.

same, ch. 8, to build courthouse for Crain county and to raise tax to pay for the same.

p. 147. Act of 1762, ch. 12, creating Mechlenberg county.

p. 147. Act of 1762, two special acts as to two counties.

p. 160. Act of 1764, ch. 14, creates Brunswick and Bute counties.

ib. ch. 17, changing boundary line between Dobbs and Pitts county.

ib. ch. 18, changing boundary between Bladen and Cumberland.

p. 161, same, ch. 19, annexes part of Craven to Dobbs county.

same. Three special acts as to counties one levying special tax on certain named counties.

p. 160, Act of 1866, ch. 20, to empower justices of Beaufort county to build courthouse, &c., and lay special tax to pay it.

p. 164, Act of 1767, annexing part of Northampton county to Bute county.

p. 166, Act of 1767, ch. 15, to empower the justices of Currituck county to build a prison, a pillory and stocks in said county on the lot whereon the courthouse stands for the use of the county.

p. 166, same, ch. 18, to appoint an inspector in Brunswick county.

p. 168, Act of 1868, ch. 10, to create Tryon county.

p. 169, Act of 1768, ch. 7, to enlarge the time for sheriffs to settle their accounts with certain named counties.

p. 170, Act of 1768, ch. 14, an act in reference to stray horses in 15 named counties.

same, ch. 17, to appoint commissioners to build prison, pillory and stocks in Duplin county.

p. 171. Act of 1769, ch. 2, confirming the qualification of Henry Cockey, sheriff of Beaufort county.

same, ch. 3, to destroy in certain named counties.

same, ch. 4, to empower the justices in several counties therein mentioned, to establish free ferries and bridges in their respective counties and lay a tax for defraying the charges thereof.

p. 172, Act of 1770, ch. 18, to annex Occacock island to Cartaret county.

p. 174, same, ch. 22, to create Wake county.

same ch. 22, to create Guilford county.

p. 175, same, ch. 27, to create Chatham county.

p. 178, act of 1770, ch. 39, to fix boundary line between Brown county, and the counties of Mechlenberg and Tryon.

p. 180, act of 1770, ch. 41, to alter the method of working the road in Davis county.

same, ch. 42, to create Surry county.

same, ch. 42, to build prison, courthouse, stocks, in Tryon county.

same, ch. 12, to prevent untimely destruction of fish in Carteret county.

same, ch. 14, to establish a public inspection of tobacco in Johnston county.

p. 180, general act of 1770, ch. 18, to amend an act to empower the interior courts of the several counties in this province to order the laying out of public roads, to establish ferries; and to appoint where bridges shall be built for the use of the people of this province.

same, ch. 30, to appoint a special tax collector for Tryon county for the uncollected revenue 1768.

same, ch. 38, to enlarge time for settlement of sheriffs of certain named counties.

p. 182. Act of 1771, ch. 2, to alter the method of working upon certain roads in certain counties named therein.

p. 182. Act of 1771, ch. 3, to authorize the sale of the Glebe lands in St. Gabriel's parish, in Duplin county.

same, ch. 8, to authorize arrearages of taxes in Rowan county to be collected.

same, ch. 13, to encourage destroying vermin in certain counties.

same, ch. 15, to enlarge time for settlement of sheriffs of certain named counties.

same, ch. 22, to lay out a public road through four counties.

same, ch. 23, to appoint two special collectors in Anson and Rowan counties to collect unpaid taxes of 1770.

p. 185. Act of 1773, ch. 6, to annex part of Rowan county to Surry county.

p. 187, same, ch. 7, to build a jail in Beaufort county.

same, ch. 9, to lay out and establish a road from Charlotte, in Mechlenberg county, to Bladen courthouse.

same, ch. 10, to alter way of working roads in certain counties.

same, ch. 12, to alter way of working roads in New Hanover county.

same, ch. 16, to encourage destroying of vermin in certain named counties.

same, ch. 20, to lay out a public road from Dan river through counties of Guilford, Chatham and Cumberland to Completon, and from Shallow Ford, in Surry county, to join the same.

same, ch. 21, through three named counties.

same, ch. 27, to build prison in Duplin county.

same, ch. 30, to repair jail in Halifax.

same, ch. 31, to continue the tax imposed to build a courthouse in Salisbury.

same, ch. 33, to build a public jail in Wilmington.

same, ch. 34, to build a public jail in Edenton.

p. 118. Act of 1774, ch. 12, to appoint commissioners to build a courthouse, prison and stocks for Tryon county, and to fix boundary between Tryon and Mechlenburg.

p. 188. Gen. Act 1774, ch. 12, to establish inferior courts of pleas and quarter session.

p. 189. Act 1774, ch. 32, to create Martin county.

same, ch. 9, to erect a courthouse, prison and stocks in Bertie county, in Windsor town.

same, ch. 13, to divide Edgecomb county into two parishes.

same, ch. 14, to establish the courthouse in Charlotte, Mechlenberg county.

same, ch. 15, to divide St. Mary's parish, of Edgecomb county, into two.

same, ch. 16, to make Martinborough, county seat of Pitt county, and to remove courthouse, prison and stocks into said town.

same, ch. 19, to destroy vermin in certain named counties.

same, ch. 20, to repair Halifax jail.

same, ch. 22, to erect courthouse in Salisbury.

same, ch. 24, to erect courthouse in Guilford.

same, ch. 25, to empower Anson county justices to establish free ferries and to lay a tax to pay the expenses thereof.

same, ch. 26, to create county of Surry.

same, ch. 27, to empower the justices of Bladen to hold court in Elizabethtown.

same, ch. 30, to create parish in Chatham county.

Sec. 33, justices to be recommended to the Governor by the General Assembly; and he shall commission them to hold during good behavior.

p. 202. Act of 1777, ch. 17, to create Caswell county.

p. 203. Act of 1777, ch. 18, to create Camden county.

same, Act of 1777, ch. 19, to create Burke county.

same, ch. 27, gen. act, erecting county courts and sessions of the peace, and for appointing and commissioning justices of the peace and sheriffs in and for all the counties.

p. 204, same, ch. 18, gen. act, vesting in the several county courts power to select jurors for the districts.

p. 204. Act 1777, to empower justices of Bladen to take possession of records of said county.

same, ch. 11, to establish fairs in Halifax county.

same, ch. 12, to enlarge time of saving lots in Bertie county, Windsor.

same, ch. 13, to appoint commissioners to build court house, prison and stocks in Tryon county.

same, ch. 14, same for Guilford county.

Act of 1784, ch. —, charter of the Great Dismal Swamp Canal, giving it right of eminent domain, exemption from taxation, etc.

Act of 1823, ch. 7, sec. 1, p. 9, exempt from taxation lands of religious societies, act of Oct. 18th, 1824, ch. 141, p. 134, sec. 1, exempts from taxation the Point Mountain Turnpike Road.

Another act exempts iron and salt from taxation.

Another exempts groceries sold by farmers.

Another exempts all inundated lands.

Four banks, the Union, the Planters, the Farmers and the Bank of Tennessee were all created by special acts before 1834, containing exemptions from taxation, franchise of banking, and right to tax more than 6 per cent. interest, and these exemptions in suspension of general laws.

EXHIBIT "B."

The act of 11th December, 1845, incorporating the Nashville & Chattanooga Railroad, sec. 17, provided that any State, or any citizen, corporation or company of this or any other State or country, may subscribe for and hold stock in said company, with all the rights and subject to all the liabilities of any other stockholder.

It was under this power, as adjudicated in Nichol's case, in 9th Hum., that Nashville made its subscription.

This charter also exempted the capital stock of the company from taxation forever, and the road and all its property for twenty years from completion, and exempted the officers, agents and servants of the company from military, jury and road duty.

These same powers, rights, franchises and exemptions are, by the following special acts, conferred upon certain other named companies:

Act of 2d February, 1846, to Memphis & Charleston Railroad.

Act of 28th January, 1848, to Mobile & Ohio Railroad, and this provides that at no time shall any tax be levied on this road if thereby its dividends be reduced below 8 per cent.

Act of 28th January, 1848, to the Tenn. Central Railroad.

Act of 20th February, 1852, to the E. T. & Va. R. R., p. 380.

Act of 20th February, 1852, to the Poplar Creek, etc., ch. 355.

Act of 15th November, 1849, to the Henderson & Nashville Railroad, except that hereby all the property of the road is forever exempt from taxation.

Act of 17th January, 1850, to the Hamilton & Harrison Railroad.

Act of 9th February, 1850, to the Nashville & Alabama.

Act of 9th February, 1850, to the Winchester & Ala.

Act of 28th January, 1850, to the Clarksville & Madisonville Railroad, and allows counties to take stock.

Act of 1st February, 1850, to the Louisville & Nash. Railroad.

Act of 7th February, 1850, to the Chattanooga, H. & C.

Act of 4th February, 1850, to the Shelbyville & Columbia.

Act of 26th February, 1858, to the Cleveland & Ducktown.

Act of 23d January, 1852, to the Tennessee & Alabama.

Act of 27th January, 1862, to the Pikeville & Jasper.

Act of 1st January, 1852, to the Nashville & Southern.

Act of 31st January, 1852, to the Southwestern.

Act of 28th February, 1852, to the Central Frank.

EXHIBIT "D."

The following are some of the special acts passed at the same and subsequent sessions of the Legislature varying the general law for certain named counties:

1. Act of 3d November, 1857, to authorize the county court of Haywood county to levy a tax and build a Turnpike road and Ferry across Big Hatchie river. This required no vote of the people. This was built.

2. Act of 2d January, 1852, "to authorize the corporate authorities of the city of Nashville to subscribe stock in railroad companies." This act conferred the power on the Mayor and Aldermen to subscribe any amount in any railroad, in their discretion and without a popular vote. This was exercised.

3. Act of 28th February, 1852, sec. 12, etc., authorized Lawrence, Maury, Williamson and Davidson counties to issue 10 30-year 6 per cent. bonds in payment of any stock subscription they might make.

4. This power is by sec. 20, of same act extended to Jefferson, and seven other counties.

5. Act 16th February, 1852, sec. 10, gave to the county court of Maury county the right and power to convert her appropriation of $5000 to the Duck river bridge, into stock in a Suspension Bridge Company, and to become stockholder to that extent in the company, without a popular vote.

6. Act of 12th February, 1852, allowed Weakley and Obion counties to expend certain improvement funds then in Bank of Tennessee in construction of roads, bridges, etc.

7. The act of 27th January, 1854, declared valid an election and subscription by Blount county to the Knoxville & Charleston Railroad Company, the same having been subscribed and voted on terms and conditions authorized by no act of assembly and allowed 30 years 6 per cent. bonds to issue, and directed the county court, a majority being present, to comply with the provisions of this act without further vote. This power was exercised.

8. The act of 16th December, 1853, declared that the failure of Shelby and Tipton county courts to pay 2 per cent. or comply with certain charter requirements, etc., should not release them from their subscription to the Nashville and Memphis Railroad and declared such subscriptions valid.

9. To the same effect is the act of 2d March, 1854, as to Montgomery subscription to the M. C. & L. R. R. Co.

10. The act of 18th February, 1854, granted to Tipton and ten other counties to take stock in any railroad, and to issue coupon bonds, 10 30-year 6 per cent., the same as Lawrence, Davidson and others might do under the act of 28th February, 1852.

11. This act of 18th February, 1852, also enacts that the acts of any of said counties in subscribing stock, etc., not provided by law, are valid and binding, etc.

12. The act of 28th February, 1854, validates certain subscriptions by Shelby and Tipton counties to the Nashville & Memphis Railroad Company, and then authorizes the county court of Tipton, without a vote of the people, to transfer said subscription, already voted from said road, and deliver it to the "Great Central North & South Rail-

road Company, a road having different *termini* from the Nashville & Memphis R. R.

13. Said act provides for other counties taking stock in said Nashville & Memphis Railroad, and thus enacts in the 11th section. That upon application of the President of said company, at any time, it shall be the duty of the chairman of the county court of any of the several counties herein named to give reasonable notice to the magistrates of the county to appear at the courthouse on a certain day to be named, who, when convened, shall carry into effect any of the requirements of this act, which shall be in all respects valid: Provided, a majority of the justices be present and assent thereto.

14. The act of 29th February, 1856, grants to Jefferson and these other counties power to issue bonds just as Lawrence, Davidson and others might do under act of 28th February, 1852, and by sec. 3, grants to Jefferson and said three counties power to subscribe to any railroad on a mere majority vote, that is if a majority of the votes cast at such election favored the subscription, and by sec. 5, said act validates a subscription made by Claiborne county, a majority of the votes cast at its election having favored, thus disregarding the general act of 24th January, 1854.

16. The act of 29th February, 1856, sec. 15, grants to Gibson the same exemption from the act of 24th January, 1854, and allows it to subscribe on a mere majority vote, those actually cast.

17. So also does the act of 28th February, 1856, grant the like exception to Monroe and McMinn counties.

The act of 19th March, 1860, sec. 2, provides that sec. 1434 of the Code shall not apply to the Murfreesboro and

Woodbury turnpike road or any other road in Cannon county.

The act of 12th of January, 1838, is as follows: "To constitute James D. Freeland a sole corporator for the purpose of navigating Duck river with steamboats, and for other purposes."

The act of 49–50, p. 416, gave to the county court of a county power at will over river improvement fund—requiring no popular vote.

18. The act of 27th February, 1856, granted the power to the county court of Tipton county to subscribe stock $25,000 in the Covington and Sharon Turnpike Company, to levy a tax to pay the same, etc., all without any popular vote.

19. The act of 29th February, 1856, gave to the county court of Lincoln county power to build a bridge over Elk river, requiring no popular vote. This was done.

20. The act of 23d February, 1856, sec. 10, authorized the county court of Knox and the corparate authorities of Knoxville to take stock in the Knoxville Bridge Co., and to sell and convert any other stocks held by the county or city to pay therefor, etc., and required no popular vote either as to taking stock in the bridge company, or the sale of other stocks. This was done.

21. The act of 20th February, 1858, sec. 27, gave the county court of Montgomery county power to sell or donate that county stock in the Red River Bridge Co., to the city of Clarksville, and required no popular vote.

22. The act of 15th March, 1858, gave to Lauderdale county power to maintain its public roads by a tax, etc., letting out the work to contractors and devolved the

power on the county court to levy the tax without a popular vote—providing that in case the court would not levy the tax, then the people might vote it themselves. This was done.

At this time all the other counties maintained their roads under a general law requiring all persons within certain ages to work the roads—and save this act, such has always been and is now the law in this State.

23. The same power was granted to Washington, Sullivan and Hawkins counties by sec. 10—and the act of 29th February, 1860, recites that the county court of Sullivan having this power refused to exercise it, whereon the people voted upon it themselves, and doubts existing as to the legality thereof, this latter act makes all the proceedings valid and binding, levies the tax, etc.

These taxes were, as I am informed, tested by Lauderdale, where no vote was taken, and the validity of said act of 15th March, 1858, affirmed in the Supreme Court just prior to the war—opinion was never published, and was lost during the war.

This same change and new power to maintain county roads by county taxation was by the act of 20th January, 1858, granted to the county courts of Henry, Gibson, Dyer, Carroll and Lewis, the same power as above set out as to Lauderdale.

The following special acts other than those under which the bonds sued on herein, were passed at the session of 1866–7:

24. ch. 41. To Hawkins county court by a vote of two-thirds of its members to issue coupon bonds for the amount

of its indebtedness. The several sections of this act give the like power to nineteen other named counties.

At the time this was done the general law, code sec. provided only for issuance of county warrants which bore no interest.

25. ch. 23, sec. 4, granted to the county courts of the counties through which certain named turnpike roads passed to take stock therein and issue coupon bonds therefor, prescribing no limit and requiring no popular vote.

26. ch. 27, secs. 4, 5, granted to the county courts of Hancock and Hawkins counties power to take that stock in the Sneedville turnpike road and to issue their bonds therefor, requiring no popular vote.

27. ch. 58, sec. 6-10, granted to Nashville and Clarksville power to take stock in the Louisville, Henderson & Nashville Railroad, requiring a popular vote, a mere majority of the votes cast being sufficient to carry such subscription.

28. ch. 66, sec. 3, by which the Harrison, Selma and Cincinnati Railroad was incorporated, provided that "the County Court of Hamilton county is hereby authorized to subscribe stock in said company, to any amount not to exceed ten thousand dollars."

29. By sec. 21 of the same act, it is enacted that the County Court of Sevier county is hereby authorized and empowered (a majority of the justices voting therefor) to issue to said company (the Sevierville Turnpike Co.) county coupon bonds to the amount of ten thousand dollars, having ten years to run at six per cent. interest. And nowhere is any popular vote required for either of said subscriptions.

30. ch. 67, sec. 10, enacts "that the county of Jefferson, in this State, through the County Court thereof, may take stock in said company," (the Dandridge Railroad Co.,) provided two-thirds of the justices of the peace of said county present and acting, shall vote for the taxing of the stock in said company. And no popular vote is required as to it.

31. By chapter 80, the Chattanooga Bridge Company is incorporated, and sec. 10 thus provides that nothing in this act shall be so construed as to prevent the County Court or corporate authorities of Chattanooga from building any bridge they may believe for the public good, or purchasing the bridge herein provided for, requiring no popular vote.

The following are the special acts passed at session of 1869, 70, granting special power and privileges to certain named towns and counties:

32. ch. 26, sec. 61, allows Memphis to subscribe for stock in any road, in its discretion, and on any terms, requires majority of popular vote, but suspends the general law as to terms, etc.

33. ch. 43, sec. 8, 9, grants to towns and counties power to donate to or subscribe stock to Cincinnati Southern Railroad on a majority vote.

34. ch. 49 recognizes the subscriptions and bonds issued to the Mississippi River Railroad, sued on herein, and provides means for the collection of tax for their payment.

35. ch. 55 grants Haywood county and the town of Brownsville power to subscribe for stock in the Brownsville and Ohio Railroad on a mere majority of popular vote, to issue coupon bonds, etc.

36. And by secs. 7, 12, 19, grants same power to Friendship and Newbern and county of Obion.

37. ch. 56 enacts that the corporate authorities of the city of Knoxville, and the County Courts of Blount and Sevier counties, may take stock in the Knoxville Bridge Co., and be subject to all the liabilities and entitled to all the rights, etc., as other stockholders, requiring no popular vote. This was done.

38. ch. 58. By sec. 16 of this act the general law is in fact suspended as to certain named counties and towns, in the providing that before they might take stock in the Tennessee Central Railroad a majority of three-fourths of the qualified voters therein should be had, might then issue bonds, etc.

39. ch. 63, sec. 15. Hereby there is granted to two counties, Sumner and Wilson, power to take stock in the Lebanon & Gallatin Railroad on a mere majority vote, and to issue bonds.

40. In ch. 67, sec. 92, we find the following special power:

That, at the county town of William county, a majority of the justices of said county voting for the same, shall have power to subscribe stock for the county of Wilson in said company (Lebanon and Statesville Turnpike Co.) to an amount not exceeding one thousand dollars per mile, to be paid by the issuance of county bonds, or by the levy of a tax upon the property of said county, or in such other mode as they may deem proper, without a popular vote.

41. By section 93 of same act, the same power is given to the town of Lebanon.

42. By chapter 71, section 5, towns and counties may take stock in the Louisville and Chattanooga Grand Trunk Railroad, on mere majority vote, and may issue eight per. cent bonds.

43. By chapter 91, Green county is authorized to take $50,000 of stock in the Greenville and Warm Spring Turnpike Co., to issue twenty-year coupon bonds, and requiring mere majority vote.

44. By the third section of chapter 113, the provisions of chapter 56, above cited, are re-enacted, including Knox county, and requiring no popular vote, but allowing the county court to subscribe, etc.

EXHIBIT "E."

The following special acts apply only to the named counties, giving to them one by one in separate acts the powers named:

Acts 37, 38, p. 95, as to Madison county, gave power to its county court to use and dispose of internal improvement fund at will.

same, p. 66, same as Madison is given to Hardeman.

same, p. 80, same as Madison is given to Lincoln, with power to lend out said fund at interest.

same, p. 112, same as Madison is given to Jackson.

same, p. 113, same as Madison is given to Smith.

same, p. 120, same as Madison is given to Dickson.

same, p. 270, same as Madison is given to Hickman.

same, p. 405, same as Madison is given to Stewart.

same. p. 412, same as Madison is given to Henry.

same, p. ——, same as Madison is given to Weakley.

same, p. 181, same as Madison is given to Perry, with power to buy and use a ferry boat.

same, p. 293, same as Madison is given to Marshall, with power to expend moneys for opening and improvement of streets of Louisburg.

same, p. 43, 44, p. 114, gave to Marshall county court power to expend moneys to defray expenses of establishing county surveys, etc.

same, p. 73, gave to county courts of Shelby, Fayette and

Hardeman power to open and build a class of highways forty-five feet wide, to appropriate moneys to pay therefor, etc.

In no one of these acts was any popular vote required, nor were the powers therein conferred upon the named counties conferred upon other counties, nor upon the county courts of any other counties.

EXHIBIT "F."

WALLACE ET AL. v. TIPTON COUNTY ET AL. } Second Opinion of Supreme Court of Tennessee on application for re-hearing.

An application to re-open this cause has been presented, but after the time limited by a rule of the court for the presentation of such petitions; and upon this ground further examination of the cause upon the main question, upon which it was decided, might well have been refused.

But upon the explanation of counsel as to the cause of the delay in presenting the petition, and in view of the important interests involved, the cause has been reconsidered.

We held that the act of 1851-2, ch. 117, Code, sec. 1142, etc., was a law of the land prescribing the mode in which, and the conditions upon which, counties might subscribe stock in railroad companies. And so it was held in the case of L. & N. R. R. Co. v. Davidson Co. et al., in which case its constitutionality was contested—1 Sneed, 476. We also held that the acts of 1867, under which the subscription of stock by Tipton county was made, were partial and special laws in conflict with the general law and repugnant to art. 11, sec. 7, of the Constitution of 1834. It is said that, in 3 Head, 322, it was held in the case of the corporation of Chattanooga v. McCallie, that art. 2, sec. 29, conferred the power on the Legislature, to authorize the mayor and aldermen to subscribe for stock without a vote of the inhabitants, and the recent case of Ross v. Anderson County

recognizes the same doctrine. In the first named case the question is not discussed at all, a simple declaration of power conferred by the Constitution, without any reference to a discussion of the effect of the act of 1851–2, as an exercise of that power. In the other case it is held, where the power exists and has been exercised, a mere irregularity in its exercise may be cured by legislative enactment, or may be insufficient to render the acts void.

In the case of McKinney & Co. v. Memphis Overton Hotel Co., opinion by Judge Freeman, at the April term, 1873, of this court, the question under discussion arose upon a charter of said corporation, (company,) authorizing it to issue bonds bearing more than six per cent., the legal rate of interest at the time the charter was granted. The court say, the very fact that the act of the Legislature had to be passed for this purpose, settles, we think, the question conclusively, that it is a law passed in derogation of the general law of the land to enable something to be done that could not legally be done, so as to effectuate the end desired.

See also 2 Head, 276.

This case is a very strong illustration of the soundness of the argument presented in the foregoing extract. There was a general law allowing stock to be subscribed by counties to railroad companies, but legislation was needed to relieve this company and county from the operation of that general law, and accordingly it was procured; and the county court having been organized with a view to subserving the interests of the railroad company, the scheme of subscription, taxation and issuance of the bonds of the county was consummated by corrupt means which we refrained from commenting on, in the opinion delivered,

only because the evidence disclosing the facts could not be looked to as against the company. We allude to it now, by way of illustrating the wisdom of the provision inhibiting the passage of partial laws, which are often attempted to be passed in the interest of oppression and injustice.

The popular approval by their votes before lending credit to corporations by counties, towns and cities has been deemed so necessary to the protection of the people against onerous taxation, that the Constitution of 1870 has forbidden it to be done without assent of three-fourths of the voters in the election upon the question, art. 2, sec. 29.

In the case of McKinney & Co. v. the Overton Hotel, when the law allowing 10 per cent. interest to be taken was held to be inconsistent with the general laws of the land, "it was very plausibly argued the proviso of the section of the constitution prohibiting said special laws, excepted from its operation such powers as were conferred in charter of incorporation." But this court held that the Legislature could not, in the act of incorporation, authorize such corporation either to give or take any more than the uniform and equal rate of interest which is fixed by the general law of the land. We conclude by saying that we are satisfied with the correctness of the opinion heretofore delivered, and adhere to it; and dismiss the application for a rehearing.

[Signed,] DEADERICK, Judge.

EXHIBIT "G."

R. H. WALLACE ET AL.
v.
THE COUNTY COURT OF TIPTON COUNTY ET AL. } Opinion.

In 1858 the Mississippi River Railway Company was incorporated by the Legislature of this State. The company organized during that year or the year following. Its projected course was through Tipton, Lauderdale, and other counties between Memphis and the Kentucky line. But little more than the organization of the company was done towards the construction of the road until after the termination of the late war between the States.

In August, 1866, one Abram S. Mitchell became the President of the company, and so continued until June, 1870.

On the 25th of February, 1867, the General Assembly passed an act for the benefit of the Winchester and Alabama Railroad Company, and other purposes, the sixth section of which is as follows:

"*Be it further enacted*, That the County Court of any county through which the line of the Mississippi River Railroad is proposed to run, a majority of the justices in commission at the time concurring, may make a corporate or county subscription to the capital stock of said railroad company of an amount not exceeding two-thirds of the estimated cost of grading the road bed through the county and preparing the same for the iron rails; the said

costs to be verified by the sworn statement of the president or chief engineer of the company. And after such subscription shall have been entered upon the books of the railroad company, either by the chairman of the County Court or by any other member of the court appointed therefor, the court shall proceed without further reference or delay to levy an assessment on all the taxable property within the county sufficient to pay said subscriptions; and the same shall be payable in three annual instalments, commencing with the fiscal year in which said subscription shall be made. And it shall be lawful for the County Courts making subscriptions as herein provided to issue short bonds to the railroad company in anticipation of the collection of the annual levies, if thereby the construction of the work may be facilitated; and in all other respects, except as herein specifically provided, the capital stock of said railroad company to be subscribed by counties shall be governed by the general internal improvement laws of the State."

And on the 5th of November, 1867, the Legislature passed another act, amendatory of the act of 25th February, 1867, just quoted, which is as follows:

"*Be it enacted*, That the sixth section of an act passed on the 25th of February, 1867, entitled an act for the benefit of the Winchester and Alabama Railroad Company, and for other purposes, be and is hereby amended as follows, to-wit:

"That the subscription authorized in said sixth section to be made to the capital stock of the Mississippi River Railroad Company by the counties along the line of said rail-

road may be made at any monthly term of the county courts of said counties, or at any special terms of said courts; *provided*, that a majority of all the justices in commission in the counties respectively, shall be present when any such subscription is made, and provided further, that a majority of those present shall concur therein."

At the February Term, 1869, of the County Court of Tipton county, said Mitchell, as President of the Company, presented his affidavit, "that the cost of the grading and preparation of the road-bed for said railroad through the county of Tipton, according to the estimate of the chief engineer thereof, would exceed three hundred and eighty thousand dollars."

Thereupon, upon motion of William McIntosh, Justice, etc., it was ordered, pursuant to the authority conferred upon the counties lying along the route of said railroad, by the act of twenty-fifth of February, 1867, that the county of Tipton, by the Chairman of said court, be instructed to subscribe the sum of two hundred thousand dollars to the capital stock of the Mississippi River Railroad Company, on the terms and conditions prescribed by the act of the Legislature aforesaid, authorizing such subscriptions to be made. The order made an appropriation of $200,000 for said purpose, to be paid at the rate of $40,000 annually, in bonds maturing in one, two, three, four and five years, bearing six per cent. interest, payable semi-annually, and the same order directed that a special tax should be levied on the taxable property of the county to meet such annual appropriations, and three members of the court were appointed to represent the stock in the meetings of the stockholders.

At the July Term, 1869, of said county court, the interest on the bonds was made payable annually, instead of semi-annually, as by order of the preceding February term, and a tax of two and a quarter cents was levied upon every dollar's worth of taxable property within the county, to meet the payments upon said subscriptions as they fell due.

At the July term, 1870, of said county court, it was ordered that the bonds of the county to said Mississippi River Railroad Company had been issued without a vote of the people or authority of law, and no tax should be levied to pay them, and a committee was appointed to employ counsel to resist the tax.

At the October term, 1871, the said county court accepted the proposition of said railroad company to extend the time of payment of the bonds to ten years. This extension was proposed upon condition that the county court should immediately levy a tax to pay what was then due, and might thereafter become due, under the proposed extension of time; and the court then levied a tax of eighty-five cents on each hundred dollars' worth of taxable property.

At the July term, 1872, the said county court levied a tax of one per cent. upon the taxable property of the county to meet said subscription.

At April term, 1873, the railroad company made application to the County Court to issue coupons or warrants for one-half of the matured bonds and interest, which application "was laid over until the July term of this court." And at the July term, 1873, the court refused to issue such coupons on warrants, and at a subsequent day of said term

a tax of ten mills on the dollar was levied to meet the instalment and interest falling due in the year 1873.

In the meantime, on the 22d May, 1873, the complainants, taxpayers of the county of Tipton, filed their bill, praying and obtaining an injunction to restrain Hall and Walker, the collectors of said railroad tax, from collecting the same, and asking a decree declaring the whole proceeding of the County Court to be unconstitutional, illegal and void, and enjoining all said defendants from any further attempt to collect or enforce the payment of said tax, and to order the bonds which had been issued, and held by the railroad company, to be surrendered, canceled and declared void. The County Court, the said Hall and Walker, tax collectors, and the Paducah and Memphis Railroad Company, by which name the consolidated companies of the Mississippi River Railroad and Paducah and Gulf Railroad were known at the time of the filing of the bill, were made defendants to the bill.

The bill charged the facts hereinbefore recited, and that the subscription of stock and levy of taxes was unauthorized, and that said county had issued bonds, which were then in possession of defendant, the railroad company. And that the said tax collectors had collected, and were still collecting, taxes under said illegal and void orders of the County Court, and had levied upon some of the property of some of complainants.

It was further alleged, that some of the persons acting and voting for said subscription and taxes, as members of the County Court, were not, in fact, justices of the peace, were not elected by the people as such, but were assuming to act under commissions issued by Wm. G. Brownlow, as

governor, who had no authority to issue such commissions, except to such persons as had been elected by the people, in the manner prescribed by the Constitution.

The railroad company filed its answer, and admits the county subscription was made as alleged, and under the authority of the acts of the Legislature referred to in the bill, and insists that the subscription and levy of taxes and issue of bonds were valid and authorized acts of the County Court, and that, if there were any irregularities in the proceedings of the County Court, the new contract made by the order of October term, 1871, of said County Court, the payment of taxes by the taxpayers operated as a ratification of the subscription, and as an estoppel upon the said county and taxpayers to deny the validity of said subscription; and defendant insists that sec. 1145 of the Code has been complied with so far as it has not been modified or repealed by the act of February 25th, 1867. They also aver, that the railroad company has done all the law required to be done to authorize them to receive the bonds.

The answer of the company "admits that it holds some of the bonds so issued as aforesaid, and says that others have been hypothecated and sold all over the country and the proceeds used for the completion of the road, as it had the right to do; that many of the bonds are beyond its control and their whereabouts at present is not within the respondent's knowledge."

Hall and Walker answer and admit that they are collecting the railroad taxes, and adopt the answer of the railroad company.

The County Court failed to answer, and a judgment *pro confesso* was entered against it.

At the May term, 1874, of the court, certain non-residents of the State were upon their own petition, setting forth that they were holders of part of the said $200,000 Tipton Co. bonds, allowed to be, and were made, defendants to the cause, with leave to plead, demur or answer the bill. Upon being made parties defendants without making any defence in any of the modes indicated in the order admitting them as defendants at the same term, petitioned under the act of Congress to have the cause removed to the United States Circuit Court at Memphis, which was ordered to be done at the same term, and the cause as to them was removed to said U. S. Court.

At the May term, 1875, the complainants asked and obtained leave to file, and thereupon did file, their amended bill, alleging that they had recently discovered new facts, showing the fraudulent manner in which said subscription and issuance of bonds had been obtained and procured; that the President of the company, by the influence he had with the Governor, prevented justices elected from being commissioned and procured him to commission certain persons as justices of the peace who were not elected, and were commissioned upon the promise to vote for said subscription; that others were influenced by bribery and other corrupt means to vote for the subscription, although they knew the people were opposed to it.

The order allowing this amended bill to be filed allows the defendant until June rules to answer it. It then proceeds as follows: "And the defendant, the Paducah & Memphis Railroad Company, is allowed in its said answer to said amended bill to incorporate therein, as by way of amended or supplemental answer (or either, as the case

may be), as to its answer hereinbefore filed, to the original bill of complainants, any matter of disclaimer of interest in the subject matter of this suit or cause.

The railroad company filed its answer to the amended bill, and after a very explicit denial of the several charges of fraud, bribery and corruption, says "that while in its answer to said original bill hereinbefore filed, it admitted that it held some of said bonds, yet now it is the owner and holder of none of said bonds, and has no interest in this cause whatever, for respondent states that as above related, when said bonds were taken by it, and redeemed, that then it again issued said bonds on the faith of said ratification of said county court, at its October term, 1871, and other terms, and obtained moneys used in the building of said road, as aforesaid, and said bonds, then, and before the filing of said bills, passed into the hands of other holders for value." "And now this respondent disclaims all and any interest in, or because of any of the matters and things complained of in complainants' said bills."

This answer was filed 5th July, 1875, and at the August term of the court next thereafter, the said defendant filed a formal plea of disclaimer by leave of the court, complainants excepting to the action of the court in granting leave to file said plea, and the defendants, Hall and Walker, answered, and accompanied their answer with a plea of a want of necessary and proper parties. Upon the said answers and pleas and judgments *pro confesso* against the county court, and facts admitted and affidavits treated as depositions by agreement with the county court, the circuit judge who presided in place of Chancellor Living-

ston, who was incompetent to try the cause heard, and determined the cause, holding the acts of 25th February, 1867, and 5th November, 1867, to be unconstitutional, and the subscription of stock by the county court unauthorized and void, as well as those orders directing the levy of taxes and issuance of bonds to said railroad company, and also all orders passed subsequently in ratification of previous orders.

The court also adjudged and declared that the passage of the aforesaid acts of Assembly of 25th February, and 5th November, 1867, the subscription of stock and issuance of bonds, were procured by fraud of said railroad company, and for this reason also adjudged the proceedings of the county court to be void.

The injunction restraining the county court from levying, and Hall and Walker from collection of taxes, was made perpetual. But the court was of opinion, and so decreed, that no decree could be rendered against the railroad company, upon its answer and plea of disclaimer, and dismissed the bill as to said company with costs.

No other relief against Hall and Walker was granted than perpetuating the injunction inhibiting the collection of taxes and giving costs against the county.

The complainants and the county court have appealed, and Hall and Walker have filed the record as a writ of error.

The pleadings and facts present several questions of interest:

1. Had the County Court under the acts of February

and November, 1867, or any other, the power to make the subscription of stock to the railroad company to issue bonds to them and levy a tax for their payment.

The act of 1852, Code, sec. 1142, et seq., is a general law of the land, giving power to all counties, cities and towns, upon specified conditions, to make such subscriptions, which has been held by this court to be a constitutional enactment. 1 Sneed, 637, holding the construction of a railroad through a county to be a county purpose within the meaning of article 2, section 29, of the Constitution of 1834, which ordains that "The General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county purposes respectively, in such manner as may be prescribed by law."

In the case already cited it is said, in construing the foregoing section of the Constitution, that the power to be conferred by the Legislature to impose taxes for county purposes "is to be communicated to the *counties*, not to the courts, nor to justices, nor to the officers." That the mode of its exercise is left to the discretion of the Legislature.

1 Sneed, 677.

Code, sec. 1142, provides that any *county* may subscribe for stock in railroads; subsequent sections define and prescribe the mode, conditions and instrumentalities by which the subscription may be effectuated. The fundamental and indispensable condition is that the approbation of the legal voters of the county must first be obtained by an election, held by the sheriff, as in other cases of popular elections.

In order that this vote may be taken, the county court may order an election upon application of the commissioners appointed to open books for subscription of stock in such road, or of the board of directors, if the company is organized. If a majority of the legal voters should vote for subscription, then the judge or chairman of the county court shall subscribe the amount of stock so voted for in the name of the county, and it shall be the duty of the county court to levy a tax to meet the installments of subscription as made, etc. These duties, imposed by the act of 1852, upon the county court, were held to be ministerial only, no power to levy a tax, appropriate money or contract a debt, nor any *quasi*, legislative or judicial power is given. All this is referred to the people. Every duty required to be performed by the county court is merely instrumental or ministerial, the court acting under the mandate of the law in carrying out the will of the people.

1 Sneed, 680–1.

It was therefore held that this unministerial duty might be performed by the quorum court. But the case cited gives no countenance to the idea that the subscription of stock in a railroad company by the quorum or quarterly court would be valid without the popular sanction obtained in the mode prescribed by the statute.

Art. 1, sec. 8, of the Constitution of 1834 provided that no freeman, etc., shall be deprived of his property but by the judgment of his peers or the law of the land; and the term "law of the land" has been repeatedly defined by our courts to mean a general and public law, operating equally upon every member of the community. And art. 11, sec. 7, of that instrument provided that "the Legisla-

ture shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any laws granting to any individual or individuals rights, privileges, immunities or exemptions, other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law."

In view of what has been already said of the act of 1851-2 as a law of the land, it is scarcely necessary to do more than to read the acts of February 25 and November 5, 1867, to be satisfied of their unconstitutionality.

Without discussion of exceptions and objections taken to the validity of said acts upon the ground of the corrupt devices employed to procure their passage, nor of the alleged bribery to obtain the votes of the County Court in levying the tax as well as in procuring the subscription to be made, the total want of power to do such acts by the county courts are decisive against the validity of the subscription and all the subsequent acts and orders making provisions to pay it.

The general railroad law made the subscription of stock wholly dependent upon the vote of the people.

The acts procured to be passed by the Legislature in 1867 in the interest of the Mississippi River Railroad Company dispensed with this vital requirement, and upon the face of the act of February 25, it is shown that the Legislature intended to exempt this particular company from the operation of the law of the land, for the conclusion of the sixth section is in these words: "And in all other

respects *except as herein specially provided*, the capital stock of said railroad company to be subscribed by counties shall be governed by the *general* internal improvement laws of the State."

The *exception* "*specially provided*" in this special act in favor of the Mississippi Railroad Company was dispensing with the popular vote, which the general law required, and some other differences of minor importance.

The acts of February 25 and November 5, 1867, are in conflict with the general internal improvement act of 1851, 2, and repugnant to the two sections of the Constitution of 1834, above cited, and are therefore utterly null and void.

The County Court, never having had any authority to make the subscription of stock, nor to levy taxes for its payment, could not, of course, ratify its own void act, having no more power to ratify than it had to perform the original unauthorized acts.

Nor has there been any such approval or acquiescence on the part of the taxpayers as estops them from contesting the validity of the acts of the County Court.

2. It has been very earnestly and plausibly argued, that the court below had no authority to pronounce a decree declaring the validity of the subscription of stock, and the illegality of the levy of taxes, because of the want of proper parties in the cause.

The argument is, that part of the bonds issued are in the hands of innocent holders, who are necessarily affected by the decree, and that they are necessary parties, and not being parties, no decree can be pronounced which declares

the several acts of the County Court invalid, and the issuance of the bonds unauthorized.

It is a general rule in equity, subject, however, to some exceptions, that all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs or defendants, so that there may be a complete decree, that shall bind them all, thus preventing future litigation and a multiplicity of suits.

Story's Eq. Pl., sec. 72.
1 Daul. Ch. Pl. and Pr., 181, 2.

A person may be affected by the demands of a complainant in equity, either immediately or consequentially, where he is in possession of the *subject matter* of the suit, or has an interest in it, in possession or in expectancy, he has such an immediate or direct interest as makes him a necessary party to the suit. But persons not directly or immediately interested in resisting complainant's demands are yet liable to be affected by them consequentially, because complainant's success against defendants may give defendants a right of action against them. Such persons, therefore, as being *consequentially* liable to be affected by the suit, must, frequently, also be made parties to it.

1 Daul. Pl. and Pr., 238, 9.

To the general rule, that all persons who are interested in the object of the bill are necessary and proper parties, there are exceptions, and, as the rule is founded upon public convenience and policy, courts of equity will not suffer it to be so app.' l as to defeat the purposes of justice, if they can dispose of the merits of the case before them

without prejudice to others who are not parties, or if the circumstances of the case render the application of the rule wholly impracticable.

Story's Eq. P., sec. 77.

If a party be out of the jurisdiction it is a sufficient ground for dispensing with his being made a party, and the court may proceed to decree on the questions between the parties who are before the court if no decree is rendered against such absent persons, even though such a decree may incidentally question or touch upon their rights.

Story Eq. P., secs. 78–82. See also ib., sec. 135 *a*.

In this case no decree was sought or rendered against the holders of the bonds. They had been made parties defendant in the cause upon their own petition, and then by their own voluntary act, under the provisions of the act of Congress for the removal of causes from the State to the Federal Courts, had the cause removed as to them to the United States Circuit Court of Memphis. And although at the time of such removal the court below had jurisdiction of them and their rights in the cause, they elected to defeat such jurisdiction, and by their own voluntary act made it impracticable for the State Court to render a decree either for or against them.

But the State court had obtained jurisdiction of the other parties and still retained it, and the right to adjudicate the questions raised by the pleadings, as between the parties to this suit. Nor can the voluntary withdrawal of the bondholders be allowed to defeat the jurisdiction of this court to render such decree, without prejudice to persons having an incidental interest as between the remaining parties to this cause.

The effect of the amended or supplemental answer of the Paducah and Memphis Railroad Company and of their disclaimer of interest in the subject-matter of the suit therein and of the formal plea of disclaimer of such interest has also been discussed.

A plea of disclaimer is the form of answer put in by a defendant where the bill charges that such defendant claims an interest in property in dispute. If the defendant denies that he claims any right to the thing demanded by the complainant's bill he may disclaim or renounce all claim thereto. But a disclaimer cannot be employed to shield a party from a liability charged in the bill nor shelter him from answering by disclaiming any interest in the matter of suit in cases where others may have an interest in it against him, he cannot disclaim his liability.

1 Dan. Ch. Pl. and Pr., 787, et seq.
Story Eq. Pl., sec. 838, et seq.

The bill charged that the railroad company had in its possession at the time of filing thereof some of the bonds of the county of Tipton, which complainant prayed might be surrendered up to be canceled. And if the facts were as charged a case for relief against the company was made by the bill which could not be defeated by a plea of disclaimer of interest in the subject matter of the suit.

The court below, upon its application, granted to the said railroad company, leave to file an amended or supplemental answer without any disclosure of the nature or extent of the proposed amendment, further than that the leave extended to "any matter of disclaimer of interest, etc." This leave was granted without any affidavit show-

ing grounds for the amendment. But the leave was granted and the amended or supplemental answer was filed without any objection thereto being made. That amendment denies the charge in the bill that respondent had any of the bonds at the time of the filing of said complainants' bills or afterwards; admits that it had some before the filing of the bill, but that they were disposed of by it before said bills were filed, and although the explanation of its former answer admitting that it then held some of the bonds, is not very satisfactory in the amended answer, yet it was filed and was unexcepted to, and explicitly denies the allegations of the bill. No objection having been taken to filing of the amended answer, we cannot now hold that it was improperly allowed, or that its averments and denials are to be disregarded.

Treating the amended answer as properly filed, and operating in its denial of the possession of any of the bonds of the county, as changing the admissions contained in the original answer, we affirm the decree below, dismissing the bill as to said railroad company, not, however, upon the grounds of its disclaimer of interest, but upon its denial of the charge of having bonds of the county at the time of the filing of the bill, there being no evidence whatever to contradict this denial of the answer.

The result is, that the decree of the court below will be affirmed, and the costs of this court and the court below will be paid by the county of Tipton.

DEADERICK, J.

EXHIBIT "H."

SUPREME COURT OF TENNESSEE.

Knoxville, September Term, 1877.

THE KNOXVILLE AND OHIO RAILROAD COMPANY
v.
JOHN H. HICKS.
} Opinion.

The plaintiff, a corporation, is the owner of a railroad extending from Knoxville to Careyville, in this State. It paid to the collector of Anderson county the taxes assessed against it under protest, and brought this action to recover the amount back, claiming that the road and its appurtenances are exempt from taxation. The facts are presented by an agreed case. The railroad in question was constructed and owned by a corporation, chartered by the Legislature of this State, under the style of the Knoxville and Kentucky Railroad Company. By an act passed 25th of February, 1856, which became part of its charter, the capital stock and dividends, road and fixtures, were exempt from taxation until the stock paid a dividend equal to the legal rate of interest. There can be no question but that the exemption was granted in express terms. The company had borrowed from the State a large number of its bonds under the general internal improvement act of 1851, 2, and having failed to pay the interest upon these bonds, proceedings were instituted in the Chancery Court at Nashville, under acts of the Legislature, passed for the purpose, for the sale of this and other delinquent roads, to

enforce the State's lien. The sale was made and confirmed, certain individuals being the purchasers. They afterwards organized under the general laws, passed since the adoption of the new Constitution, as a corporation, under the style of The Knoxville and Ohio Railroad Company, (the present plaintiff,) for the purpose of becoming the owner of the road, with its franchises; and by a decree of the court at Nashville, title was vested accordingly.

Two important questions have been presented, and ably argued: 1st, Whether the Legislature had the power, under the Constitution of 1834, then in force, to grant the exemption in question; and, 2d, If the exemption was valid in favor of the original company, does that exemption still exist in favor of the present plaintiff as purchaser?

It has been settled, since the Dartmouth College case, that the charter of a private corporation, when accepted, becomes a contract which cannot afterwards be impaired by legislative action, when the power to do so is not reserved. Stipulations for exemption from taxation, or the payment of a bonus in lieu of taxation, are important elements of the contract, and are protected by sec. 10 of art. 1 of the Constitution of the United States, and a similar provision in the Constitution of the State. That the Legislature of a State has the power to bind the State by such contracts, where that power is not denied by the Constitution, is also a result of these authorities.

As often as this question came before the Supreme Court of the United States, it was earnestly resisted, upon the ground that to permit one Legislature to barter away the

State's inherent right of taxation, so as to bind successive Legislatures, is subversive of the government itself, and allows the burthens of taxation, which should fall upon all alike, to be shifted from the property of the wealthy corporations to the shoulders of the remaining taxpayers. If this was a new question, it would deserve the most serious consideration, and courts would now doubtless hesitate long before establishing it, still it is too well established to be at once overthrown, and so the counsel for the State concede.

See Gordon v. Appeal Tax Court, 3 Howard.
4 Wheat., 518. 4 Peters, 514. 1 Black, 436.
4 Wallace, 264. 7 Cranch, 164.

But these authorities all go upon the assumption that there is no constitutional restriction upon the power of the Legislature to grant charters of the character in question. If this provision of the charter granting the exemption be in violation of the Constitution of the State, it would not be protected. Did the Constitution of 1834 of this State, in force at the time, restrict the power of the Legislature in this regard?

It must be borne in mind, that in determining what power the Legislature of a State may rightfully exercise, the Constitution of the State is not to be regarded as a grant of power. The Legislature possesses inherently all legislative power, and the Constitution is to be construed as limiting or restricting, but not as granting the power.

The first question then is, does the power to grant charters of incorporation, with exemptions from taxation or other like stipulations, binding upon the State, so that the

charter, after acceptance, becomes a contract and irrepealable, fall properly under the head of legislative power? That such power properly belongs to the legislative department of a State, when there is no special limitation of the power, is too well settled to be questioned. The decisions of the Supreme Court of the United States are numerous and uniform, beginning with the Dartmouth College case, and coming down to the present time. (Pacific R. R. v. McGuire, 20 Wal.; Wilmington R. R. v. Reed, Shff., 13 Wall.; Humphrey v. Pegues, 16 Wallace; 1 Black, 436.) It being, therefore, properly legislative power, it exists inherently, and we must look to the Constitution to see if any limit or restriction is placed upon the power of the Legislature in this regard.

And to understand properly the language of the Constitution of 1834 on this subject, we must bear in mind the terms of the previous Constitution; the powers that had been exercised thereunder; the changes made and the evils to be remedied, at the same time considering the different parts of the Constitution bearing upon the question. The Constitution of 1796 was especially defective in regard to securing equality of taxation, or the taxation of property according to its value. And this was the evil intended to be remedied by the change made and embodied in sec. 28, of art. 2, in regard to the taxation of property according to its value, and securing the equality of taxation. But is there anything in the first clause of this section intended to limit the power of the Legislature to grant exemptions from taxation in charters of incorporation, or, which is the same, to stipulate for a bonus or fixed sum in lieu of taxation? The language is, "All lands liable to taxation,

held by deed, grant or entry, town lots, bank stock, etc., and such other property as the Legislature may from time to time deem expedient, *shall be taxable.*" Was this intended to mean that thereafter the Legislature should not have the power to stipulate for total or partial exemptions from taxation in charters of incorporation? The convention of 1834 comprised among its delegates some of the ablest lawyers the State has ever produced. That they were familiar with the principles of the Dartmouth College case, decided some fifteen years previously, and followed in other cases, cannot be doubted. It is apparent also that they were familiar with the fact that the Legislature, under the previous Constitution, had exercised the power of granting charters with total or partial exemption, or contracting for a special bonus in lieu of taxation, notably in the instance of the charter of the Union Bank, granted only two years before (Union Bank v. The State, 9 Yer. 490), and that the power has never been questioned. With these facts prominently before the convention, if it was their purpose to restrict the power of the Legislature, we should expect to find such restriction expressed in unequivocal language. But the only direct provision in regard to the power of the Legislature in respect to charters of incorporation is in the proviso to sec. 7 of art. 11, to the effect that the restriction upon the power of the Legislature to grant special privileges, immunities and exemptions was not to be construed to affect the power of the Legislature to grant such charters of incorporation as they might deem expedient for the public good, thereby leaving the power as it previously existed. (See Hope v. Deaderick, 8 Hum., p. 1.) If it had been the purpose of the convention to restrict the power of the Legislature in this particular,

this would certainly have been the appropriate place to insert the restriction, but so far from doing so, we find only the proviso above referred to, which was intended only to exclude the idea that the first clause of the section against the granting of special privileges, immunities, or exemptions, was intended to limit the power of the Legislature in regard to granting charters of incorporation.

From this the conclusion seems necessarily to follow that the Legislature was still left the power to pass laws creating bodies corporate, with all the rights, privileges, immunities, and exemptions which it was usual to vest in such fictitious persons, under the general principle of law, previously recognized, and, as we have seen, the power in question was previously recognized by the general law and the authorities of this State. We do not say rights, privileges, or immunities might be granted inconsistent with other positive restrictions of the Constitution, and this brings us again to the language of section 28, of article 2, to wit: "All lands liable to taxation, held by deed, grant, or entry, town lots, bank stock, etc., and such other property as the Legislature may from time to time deem expedient, *shall be taxable*."

It has never been contended that this made it imperative upon the Legislature to tax all property. That body might tax or omit to tax; that is, for the time, exempt. If a tax was imposed it was required to be upon the value of the property, and according to the rules of equality. This is made more apparent by the change made in the Constitution of 1870, which declares that all property, real, personal, and mixed, *shall be taxed*, subject to the right of the Legislature to exempt, in certain cases, which are specific-

ally defined. It is argued that the above clause makes all the property mentioned, and such other as the Legislature might deem expedient, as continually subject to the power of taxation. That is, that it shall remain taxable, and that this forbids any action by the Legislature which would place property beyond the power of taxation. On the other hand, this section may well be construed as having no reference to the property of corporations to be created, and as leaving the power of the Legislature in this regard as it stood before. This is the more natural construction, when we take this section in connection with the clause before referred to, and find that no express restriction is placed upon the power conceded to have previously existed in the Legislature, in respect to corporations, in that clause which refers directly to the power to grant such charters. Again, the Constitution of 1834 declared that a well regulated system of internal improvement should be encouraged, and for such purpose the Legislature has often appropriated the revenues of the State, and, further, loaned the credit of the State to the extent of immense sums. The power to do this has never been questioned. If the Legislature can thus appropriate and use the public money, it is difficult to say why it may not stipulate for the release of part of the public taxes for the same purpose, as it would be in effect the same. Upon this declaration of the Constitution the Legislature has from time to time freely acted. The State was without railroads. It was regarded as a public necessity that roads should be constructed. They were to be constructed by corporations—in a sense, private corporations: and yet, as it was believed that the resources of the State would be thereby developed, and the public prosperity promoted, *they were regarded as public improve-*

ments, and to be encouraged.—(Pacific R. R. v. McGuire, 2 Wall., 36.) It was foreseen that, as a private speculation, such enterprises would not pay, especially in those portions of the State where the cost of constructing the roads would be unusually heavy; perhaps in no instance has the individual, who has invested his money in capital stock of a railroad in this State, as an original stockholder, ever been able to realize his investment, the stock selling generally at very low figures. All this was, to some extent, foreseen, and to meet this difficulty, *and induce* capitalists to risk their money in the enterprise, this proposition to exempt the property to be thus created was made in consideration of the benefits expected to result to the public from the public improvement. The property now sought to be taxed was not then in existence; it has been created, in part, at least, by the money invested upon the faith of this stipulation—much of it, for aught we know, may have been brought from other States. The people of the State have certainly, to some extent, realized from the improvements the benefits anticipated, whether to the full extent or not is immaterial. It may or it may not have been a judicious contract upon the part of the State. The necessities for revenue now demand contribution from every available source. The property of some of these roads is valuable, and exemptions are now odious. But if the law and the contract was valid at the time, we must, in good faith, abide by its terms, according to its fair and just import.

Upon this question it may be added, that where there has been no judicial construction of a clause of the Constitution, the courts have given great weight to the con-

struction given to the clause by other departments of the Government. (Stewart v. Land, 1 Cranch, 299. Martin v. Hunter, 1 Wheaton, 351. 6 Wheaton, 418. 12 Wheaton, 290.)

Several successive Legislatures that met while this Constitution was in force, a period of thirty-six years, granted charters of incorporation, with total or partial exemptions for a time, and during the entire period the power was never questioned. On the contrary, all departments of the Government acquiesced and obeyed the laws thus passed, and under these nearly all of our public improvements have been constructed. This uniform action upon the part of the State authorities is entitled to great weight. Upon this question we conclude that the Legislature had the power to stipulate for the exemption in question.

This brings us to the next question, which is, did this exemption pass to the new corporation by this sale? It is argued that at the time of this sale, which was after the new Constitution went into effect, the Legislature could not grant an exemption from taxation. It is, however, admitted that it might transfer from one to another the existing exemption, but it is denied that this was done. After the appointment of commissioners upon the part of the State to take the necessary steps against the delinquent railroads, it was found that in any attempt to sell the roads, serious questions would arise as to the rights of the State and the defendants, whether the State had the right to sell out the entire property and franchises of the companies, or only the State's lien or interest thereon, and what that interest was; whether the State could sell for the entire debt, or only the unpaid interest on the bonds; how the

rights of stockholders and others would be affected. To meet these difficulties an act was passed the 22d of December, 1870, in pursuance of the right reserved in the general internal improvement act, which directed a bill to be filed in behalf of the State against the delinquent railroad companies, in the Chancery Court at Nashville, which, by the act, was vested "with exclusive jurisdiction to hear, adjudicate, and determine all questions of law and matters of controversy, of whatever nature, whether of law or of fact, that have arisen or may arise touching the rights and interest of the State, and also of the stockholders, bondholders, creditors, and others in said road;" * * * "also, to declare the exact amount of the indebtedness of each of said companies to the State, and likewise to define, as may be thought proper, what shall be the rights, duties and liabilities of a purchaser of the State's interest in said roads, or either of them, and what shall be the reserved rights of said companies, stockholders and others, respectively, as against said purchasers after said sale, under the existing laws of this State."

The bill was accordingly filed, and by a decree before the sale, the amount of the State's debt was ascertained and adjudged, and also that the same was a lien upon the entire property, rights, privileges, and franchises of the companies; that a sale would transfer all the interest, leaving none in the stockholders or corporation; that a sale of any of the franchises of said company would vest the purchasers with all the rights, privileges and *immunities* appertaining to the franchises by the charter and amendments. A sale was made, reported and confirmed, and title vested, as before stated. Without reciting the parts of the vari-

ous decrees and proceedings bearing upon the question, it is sufficient to say that it is distinctly adjudged that not only the property of the old company, but all its rights, franchises, privileges and immunities, as defined by the charter and laws, and the decree in the cause, passed to and vested in the new company.

We are of opinion that the State, having expressly provided for the adjudication of all these questions by the tribunal appointed, and the purchase having been made upon the faith thereof, the validity of the adjudication cannot be now questioned by the State. But it is argued that under the decree vesting the new company with the rights and franchises of the old company, the exemption from taxation did not pass; that this decree could not have the effect of putting the new company exactly in the shoes of the old in all respects, so as to make the new company the same legal entity as the old. This result could only be effected by a purchase and transfer of all the stock of the old company, or by the sovereign power of the State through the Legislature, where that is allowable, and as a consequence, although the property of the old company was transferred to the new, with the privileges and franchises necessary to the use and enjoyment thereof, yet the legal existence of the old corporation was not thereby completely annihilated, but said corporation still existed, and to that existence the exemption in question still adheres as an incident, not having been in terms transferred by the Legislature. We cannot clearly appreciate the idea of the right of exemption existing in the old company after all its property and franchises appertaining to the use thereof was gone from it, and vested in the new.

Even if the old corporation still existed in the abstract, it certainly no longer had a practical existence for the purposes of its creation, and certainly to say the exemption in question still existed in the old company, when there was nothing upon which it could operate, would have no meaning.

It is manifest that when the purchasers came to contract for the entire road and franchises, it was important to know whether they were to have, as purchasers, the right to own and use property, free from taxation, as specified in the old charter. This was an important element in fixing the price. The property with this exemption, was worth more than it would have been without it. A sale of the property and franchises without the exemption would practically have taken from the old company all that was valuable to it; and yet the purchasers would not acquire what the old company owned. The old company had the property and franchises with the exemption, while the new one would acquire the property and franchises without the exemption. This would be selling the entire property and franchises of the old company for the payment of its debts, and yet destroying an important element of its value, refusing to give the old company the benefit of the exemption in the sale, and yet destroying its existence, so far as of practical importance. By this means the exemption would be practically repealed, and the State would be allowed to resume the right of taxation over the property and franchises in question, which it could not have done had the old company continued to be the owner.

This argument is used to show that the parties must have understood, from the adjudications to which we have

referred, that they were purchasing with the exemption, and with every element of value which attached to the property and franchises in the hands of the old company, and such, we think, is the fair and legitimate construction of the proceedings referred to. The case of Trank v. McGuire et. al., from the Supreme Court of the United States, is wholly different. There the railroad, etc., was purchased by the State of Missouri; and, of course, the exemption was merged, as the exemption from the right of the State to tax would mean nothing when the State itself became the owner of the property. And so, the State having become the absolute owner, when it came to sell the said road again, could sell with or without the right of exemption, without injustice to any one; but as the new Constitution of Missouri, before the resale by the State, had forbidden the grant of such exemption, it was held that the Legislature could not authorize a sale with the exemption. But here the State never became the owner of the road, and the principle of the case does not apply.

This opinion was prepared more than a year ago, and since then we have seen the recent case decided by the Supreme Court of the U. S., Morgan v. La., 3 Otto, 217. There are probably some points of difference between that case and this; the exemption there was of capital stock, works, workshops, warehouses, vehicles of transportation, and other appurtenances of the company. It is certainly clear, as said in that case, that a purchaser of an engine or car from the company would not hold such property exempt from taxation, or that the purchaser of a house would not hold it exempt from execution, because it had been exempt in the hands of the person from whom it was purchased; but here, the entire road, as a whole, was held free from

taxation; it was purchased with all its appurtenances as a whole with the franchises of the old company; that is, the right to use the property as the old company had the right to use it; and if the purchaser acquires all that was valuable, the exemption must attach to the property, especially as the decree settles that all rights and immunities passed, and nothing remained in the old company. With great respect for the high tribunal making the decision, we are not convinced by it that the exemption in such a case is a mere personal privilege, that cannot pass to a purchaser of the entire road with franchises, without a new legislative grant; the exemption being part of the charter, cannot be repealed by the Legislature. It is a right for which a consideration has been given, but the decrees of the court in this case are in pursuance of the act of the Legislature, and are equivalent to a legislative grant. Though the State has obtained the benefit of a sale purporting to be with the exemption, we think the case of Tomlinson v. Branch, 15 Wall., 460, sustains our conclusions.—(See also, Phila. Wil'n and Baltimore R. R., 10 Howard, 376.)

It will be observed that the question, whether an exemption is granted in the charter in the first instance, or what language is necessary to grant an exemption, as presented at the present term, in the case of the E. T., V. & G. R. R. Co. v. Hamblen County, is a different question from the one we are now considering; as to the transfer of such exemption upon a sale of an entire road and franchises to a purchaser, the latter question is not governed by the same reasons or rules of construction but the decrees in this case pass to the purchaser the entire franchise, with the rights and immunities appertaining thereto. We hold

upon both questions for the plaintiff, and decree that the judgment be reversed, and the judgment entered for the plaintiff.

McFARLAND, J.

We place our concurrence as to the first question upon the ground that this being a public improvement, the Legislature might grant it aid and appropriate money for its use, and releasing taxes in its favor, is the same in effect, but we reserve the question as to the power of the Legislature to made such exemptions in favor of private corporations not chartered for the purpose of constructing public improvement.

FREEMAN.

EXHIBIT "I."

CHAP. CXVII.

AN ACT to authorize and regulate county subscriptions for railroad stock.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That it shall be lawful for the county courts of the respective counties in this State, through which a railway or railways have been or shall be located, or which may be contiguous thereto, to subscribe stock in such railroad or any of such railroad companies, through their chairman, as is hereinafter provided for.

Sec. 2. *Be it enacted*, That before any county court shall be permitted to subscribe stock in the name of the county, it is hereby made the duty of said county court to call for the approbation of the legal voters of the county, by advertising an election to be held by the sheriff of the county, giving at least thirty days' notice of the same, such notice to be posted up at the election precincts in the county, which notice shall specify the amount of stock proposed to be taken by the county, and when payable. And if a majority of the votes polled be "For Subscription," then and in that case the chairman of the county court shall carry into effect the will of the majority, and shall subscribe the amount of said stock in such railroad company or companies so voted for. But if a majority of the votes

polled be "No Subscription," then the question as to the propriety of subscribing stock as before provided for, shall not again be propounded until after the expiration of six months, and not then without the concurrence of a majority of the justices of the peace of said county.

Sec. 3. *Be it enacted*, That it shall be the duty of the county courts aforesaid to order said elections for stock as aforesaid, upon application in writing of a majority of the commissioners appointed for such county, to obtain subscriptions of stock. *Provided, however*, if said railroad company shall be formed and organized by the election of a president and directors, then the application shall be made in writing by the board, and said elections shall be held and conducted as the county courts shall direct.

Sec. 4. *Be it enacted*, That the moneys raised under the provisions of this act shall be expended within the county by which such stock is taken, or as near thereto as is practicable. *Provided*, That no company shall be required, under the provisions of this act, to do any act inconsistent with the provisions of its charter, or in violation of existing obligations.

Sec. 5. *Be it enacted*, That in all cases where the stock contemplated in the provisions of this act is taken as provided for, it shall be the duty of the county courts respectively, to levy a tax upon the taxable property, privileges and persons by law liable to taxation within the county, which tax shall be levied and paid upon the principle of levying the State and county tax. And said tax shall be called the "Railroad Tax," to be kept distinct from the other taxes of the county.

Sec. 6. *Be it enacted*, That the county courts may appoint the revenue collector of the county taxes, or such other person as they may elect, the collector of the railroad tax, who shall give bond and security in such an amount as they may require, payable to the State of Tennessee, conditioned that he will discharge his duty, and faithfully account for and pay over said taxes, as they may be collected, to the president and directors of said railroad company, and he and his securities shall be liable and proceeded against in like manner, as by law revenue collectors are made liable. *Provided*, That the property now exempt by law from execution shall in no case be levied upon and sold to satisfy said railroad tax.

Sec. 7. *Be it enacted*, That the clerks of the courts of the counties so voting the subscription of stock to be taken in said railroad company shall, under the direction of the county court, make out and furnish to the collector of the railroad tax a list showing the amount of tax that each individual shall pay, which shall be made out in conformity to the last valuation of taxable property and privileges paying taxes, and in the like proportions.

Sec. 8. *Be it enacted*, That it shall not be lawful to collect in any one year, more than 33⅓ per cent. of the stock subscribed as aforesaid by any county, and the railroad collector shall forthwith proceed and collect said railroad tax, and as he shall make collections, he shall pay the same over to the treasurer of said railroad company. As the said railroad collector shall receive the tax, he shall give the person paying, a certificate, showing the amount, which certificate may be traded, assigned or transferred, and shall be receivable in payment of either freight or

passage on any road upon which such subscription shall have been expended. *Provided*, Said certificate shall be first countersigned by the clerk of the county court of the county subscribing such stock, whose duty it shall be to countersign such certificates, upon their presentation to him for that purpose, and so soon, as any person or corporation shall hold or present such certificates amounting to one share or more, in said railroad company, then the president and directors of said railroad shall issue to such person or corporation, a certificate of stock; and such certificate of stock shall entitle the holder thereof to the like rights and privileges as other stockholders in said company.

Sec. 9. *Be it enacted*, That whenever the chairman of any county court of this State, shall, upon the popular vote, subscribe stock in any railroad company, the county courts of said county may appoint a proxy from time to time, who shall represent the county and stock so subscribed, in all elections, and general or called meetings of the stockholders to the extent of the unpaid stock so subscribed.

Sec. 10. *Be it enacted*, That it shall be the duty of the clerk to make out triplicate lists of the said railroad tax, showing the amount that each person has annually to pay, one of which shall be delivered to the president and directors of said company, one recorded in his office, the other delivered to said railroad collector.

Sec. 11. *Be it enacted*, That the trustee of the county subscribing stock as aforesaid, shall annually settle with the railroad tax collector, and it shall be his duty to pro-

ceed against a defaulting collector as is prescribed by law against revenue collectors, and cause said tax to be paid over to said company. Defaulting taxpayers shall be proceeded against in the same manner as is prescribed for the collection of other taxes. Said settlements, from time to time, shall be filed with the clerk of the county court and recorded.

Sec. 12. *Be it enacted*, That for the purpose of meeting any unexpected demand on the part of the board of directors of the company, in the construction of said railroad, to be expended as aforesaid, at a time when the county may have no railroad tax on hand, the county court may anticipate the collection of the said taxes voted as aforesaid, by the issuance of the county warrants, payable as desired by said board of directors, bearing an interest of six per cent. per annum, which warrants may be received by the board of directors in payment of so much of the stock subscribed; in such cases the sufficiency of tax voted and levied as aforesaid, shall be paid into the county treasury, and shall be applied to the redemption of said warrants, and certificates of stock shall issue to the taxpayers, as is prescribed in this act.

Sec. 13. *Be it enacted*, That incorporated cities and towns within this State, may avail themselves of the foregoing provisions of this act, for the purpose of aiding in the construction of any of said railways.

Sec. 14. *Be it enacted*, That the circuit courts of the State, shall have power to issue a writ of *mandamus*, to compel said county courts to carry into effect the provisions of this act, so far as is incumbent on said county courts so to do.

Sec. 15. *Be it enacted*, That the county courts shall fix the fees of the collector of the railroad tax, and shall allow the clerks such fees as are allowed them for making out lists of the State and county taxes, and shall add a sufficient sum to the stock proposed and voted for, to cover the expenses of collecting said taxes so proposed and voted for.

JORDAN STOKES,
Speaker of the House of Representatives.

M. R. HILL,
Speaker of the Senate.

Passed, January 22, 1852.

EXHIBIT "J."

CODE 1871-2, CHAPTER 4.

1142. Any county, incorporated town, or city, may subscribe for stock to an amount not exceeding in the aggregate one-fifteenth of its taxable property, nor more than one million dollars, in railroads, running to, or contiguous thereto, upon the following terms and conditions:

1143. The approbation of the legal voters of the county, town, or city, to the proposed subscription, must first be obtained by election held by the sheriff in the usual way in which popular elections are held. Act 1851-2, ch. 117, sec. 2.

1144. The election may be ordered by the County Court or corporate authorities of the town or city, upon the application in writing of the commissioners appointed to open the subscription books for the stock of such road, or of the board of directors, if the company is organized. Ib., sec. 3.

1145. Before such application can be made, the entire line of the road in which the stock is proposed to be taken, shall be surveyed by a competent engineer, and substantially located by designating the termini and approximating the general direction of the road, and an estimate of the grading, embankment, and masonry, made by the engineer, under oath, and filed with the application. Act 1853-4, ch. 45, sec. 3.

1146. The election shall be advertised at least thirty days beforehand by notices posted up at the different places of voting, specifying the time when it is to be held, for what road, the amount of stock proposed to be taken, and when payable. Act 1851-2, ch. 117, sec. 2.

1147. At the election thus held, those voters who are in favor of the subscription will put on their tickets the words "For subscription;" those opposed, "No subscription." Ib.

1148. If a majority of the legal voters of the county, town, or city, as the case may be, estimating the vote by the last preceding Governor's election, should be in favor of the subscription, the Judge or Chairman of the County Court, or the mayor of the corporation, shall subscribe the amount of stock so voted for, in the name of the county or corporation. Ib., 1853-4, ch. 45, sec. 2.

1149. The money raised under the provisions of this article shall be expended within the county in which such stock is taken, or as near thereto as practicable. Act 1851-2, ch. 117, sec. 4.

1150. As soon as the stock is subscribed, it is the duty of the County Court, or corporate authorities, to levy a tax upon the taxable property, privileges, and persons, liable by law, to taxation within the county or corporation limits, sufficient to meet the instalments of subscription as made, and the cost and expenses of collection, which tax shall be levied and collected like other taxes. Ib., sec. 5.

1151. The revenue collector, or any other person, may be appointed by the county or corporate authorities to col-

lect the railroad tax, who shall first give bond with good security, in double the amount of the instalment proposed to be raised, payable to the State, and conditioned to discharge the duties of the office, and faithfully to collect and pay over to the railroad company, such railroad tax; upon which bond the parties are liable as in other official bonds. Ib., sec. 6.

1152. The Clerk of the County Court, or the proper officer of the corporation, shall make out duplicate lists of the railroad tax, showing the amount of tax each individual is to pay, estimated in conformity to the last valuation of taxables, and in the proper proportion; one of which lists shall be delivered to the railroad tax collector, and the other retained by him and recorded in his office. He shall also make out and deliver to the railroad company an aggregate statement of such taxes. Act 1851–2, ch. 117, secs. 7 and 10.

1153. He will ascertain the tax on privileges, when necessary, by summoning before him the persons exercising the privileges, at the end of twelve months from the levy of the tax, and taking their statements on oath. Act 1853–4, ch. 51, sec. 1.

1155. The tax collector, as fast as he makes collections, shall pay the amounts over to the company. Act 1851–2, ch. 117, sec. 8.

1156. He shall also, as he receives the tax, give to each taxpayer a certificate in such form as the railroad company may prescribe, showing the amount of such tax paid by him, of which he shall retain a duplicate to be delivered to the president of the railroad company, and such certifi-

cate is negotiable by delivery or assignment, and, with a deduction of its proportion of the cost of collection, is receivable in payment of either freight or passage on the railroad in which the subscription is taken, after the expiration of one year from the completion of such road. Ib.

1157. The holder of such certificates to the amount of one share or more of the stock of such railroad company, is entitled to demand and receive from the company, in lieu thereof, a certificate of stock in the capital stock of such company, which will give him all the privileges of any other stockholder. Ib.

1158. The trustee of the county, or recorder of the corporation, subscribing stock, shall settle annually with the railroad tax collector. Ib., sec. 11.

1159. On any default of the collector to settle or pay over railroad tax, as required, he shall be liable to the same proceedings provided for failures to pay over State or county revenue, at the suit of the company. Ib.

1760. For the purpose of meeting unexpected contingencies, the county or corporation authorities may anticipate the collection of the railroad tax by the issuance of warrants, bearing six per cent. interest, and payable at such times as may be desired by the railroad company; the warrants to be received as payment of so much stock. Ib., sec. 12.

1161. In such case, a sufficiency of the railroad tax shall be paid into the county treasury to meet the warrants as they fall due. Ib.

1162. The county, or corporation, may appoint a proxy,

from time to time, to represent the stock so subscribed in all meetings of the stockholders. Ib., sec. 9.

1163. The Circuit Court is authorized to issue a writ of mandamus to compel the County Board, or the corporate authorities of a town, or city, to carry into effect the provisions of this article, by ordering an election, subscribing stock, or levying a tax, or other act, as the case may be. Ib., sec. 14.

1164. The County Court, or corporate authorities, will fix the fees of the collector of the railroad tax and of the trustee, and allow the clerk or recorder such fees as are allowed them for similar services in regard to county and corporation taxes. Ib., sec. 15; 1855–6, ch. 110, sec. 1.

1165. The County Court of any county having stock in any railroad may sell the same, by the consent of the people of the county, signified in the manner prescribed for authorizing county subscriptions.

EXHIBIT "K."

CHAP. CXCI.

AN ACT to incorporate the Nashville, Franklin and Columbia Railroad Company.

* * * * * * * *

Sec. 12. *Be it further enacted*, That the respective county courts of the counties of Lawrence, Maury, Williamson and Davidson, be authorized and empowered to subscribe for whatever amount of stock of any railroad company chartered to build a railroad through said counties, or either of them, or any part of either of them, the said courts may deem expedient, and to issue the bonds of the respective counties for the amount of stock so subscribed in the manner hereinafter prescribed. *Provided*, That neither of said county courts shall so take stock, until the question of the taking of the same shall first have been submitted to the voters of the county which it is proposed shall subscribe stock, and the majority of such voters shall have decided in favor of taking the stock proposed.

Sec. 13. *Be it further enacted*, That upon the application of the president of any railroad company, as aforesaid, or if the company has not been organized, of the commissioners of such company, it shall be the duty of the county court of either of the above named counties to direct the sheriff of the said county to open and hold an election upon the proposition to take stock in such railroad com-

pany, on such day as the court shall order. The election shall be held at the usual places of holding elections in said county, and the tickets used in said election shall have thereon the word "Stock," or "No Stock." The returns of said election shall be made to the next term of the county court.

Sec. 14. *Be it further enacted*, That whenever the majority of the voters of either of the above named counties shall, upon the question being submitted to them, as contemplated in the previous section of this act, decide in favor of the proposition that the county shall take stock as proposed, it shall be the duty of the county court of said county to make an order, that the chairman of said court shall subscribe for the proposed amount of stock in the name of the county and obtain the certificate therefor, and that the bonds of the county shall be issued and delivered to the said railroad company for the amount of stock so taken, which bonds shall be payable to said railroad company, shall bear interest at six per cent. per annum, payable semi-annually, and shall fall due in not less than ten nor more than thirty years from date. The same shall be signed by the chairman of said court and countersigned by the clerk thereof.

Sec. 15. *Be it further enacted*, That it shall be the duty of the county court of the county which shall so take stock and issue bonds, to lay and collect an annual tax, sufficient in amount to raise a sum equal to the annual interest on bonds so issued, and also sufficient to raise a sum equal to one per cent. upon the amount of the bonds. The sum so raised by the one per cent. shall constitute a sinking fund for the redemption of said bonds, and the same and the

accruing interest thereon shall, from year to year, be under the direction of the county court, invested in bonds of the State, bearing six per cent. interest.

Sec. 16. *Be it further enacted*, That the stock so taken by either of said county courts, shall belong to the county, and the dividends which may accrue thereon, shall constitute a fund for county purposes, and may be from time to time appropriated as a majority of the justices of the peace for said county may in county court direct.

Sec. 17. *Be it further enacted*, That it shall be the duty of the county court to take from the sheriff or revenue collector, a bond to cover the tax so laid, and the sheriff or revenue collector, shall have the same powers, and be subject to the same duties and liabilities in the collection of said tax, as he has by the existing laws in the collection of other county revenue.

Sec. 18. *Be it further enacted*, That it shall be the duty of the sheriff or revenue collector of the county in which a railroad tax is laid, to pay over the money collected by him as such tax, to the county trustee of the county, within the time in which he is now required to pay over other county revenue, and it shall be the duty of the county trustee, under the direction of the county court, out of the proceeds of the railroad tax, to pay the interest on the bonds of the county so issued for stock, and to invest the residue of those proceeds in State bonds, in the name of the county. *Provided*, That the county court may direct any other person to make such investment.

Sec. 19. *Be it further enacted*, That the quorum courts of the above named counties, shall be competent to dis-

charge all the duties imposed by the 12th, 13th, 14th, 15th, 16th, 17th and 18th sections of this act, except the levying of the tax contemplated, and the appropriating of the dividends upon the county stock, which duties shall be performed by the quarterly courts of the said counties, and the circuit courts of the respective counties, shall have power upon the application of the bondholders, or any of them, or any other interested person, to issue writs of mandamus, to compel the county courts to perform the duties imposed by this act. *Provided*, That the person collecting the said railroad tax, shall receive two per cent. upon the gross amount of tax so collected by him, as a compensation, and the county trustee shall receive for his services, under the provisions of this act, a commission of one per cent. upon the railroad tax paid into his hands.

Sec. 20. *Be it further enacted*, That so many of the sections of this act, as relates to the counties of Lawrence, Maury, Williamson and Davidson, and authorizes those counties to take stock in railroads and to issue the bonds of said counties for the same, shall also apply to the following counties: Jefferson, Greene, Hawkins, Washington, Carter, Sullivan, Granger and Warren.

* * * * * * * *

Passed, February 28, 1852.

EXHIBIT "L."

AN ACT to incorporate the Mississippi River Railroad Company, (as contained in sections from 28 to 66 of an act entitled, "An act to charter the Greenville and North Carolina Railroad Company; to amend the charter of the Eagleville, Unionville and Shelbyville Turnpike Company, and to incorporate the Mississippi River Railroad Company, and for other purposes," passed January 29, 1858.)

* * * * * * * * * *

Section 28. (1.) *Be it enacted by the General Assembly of the State of Tennessee*, That John S. Stanton, Thomas L. Sullivan, John D. Williams, William D. Ferguson and Jesse Moore, of Shelby county, and John T. Fields and William G. Fields, of Dyer county, together with such persons as are now, or may hereafter become, associated with them, and their successors and assigns, shall constitute a *body corporate*, and they are hereby incorporated, under the name and style of the "*Mississippi River Railway Company*," and in that name they shall have succession for a period of ninety-nine years, may sue and be sued, plead and be impleaded, and shall possess and enjoy all the rights, privileges and immunities of such corporation, with power to make such by-laws, ordinances, rules and regulations, not inconsistent with the laws of this State or of the United States, as shall be necessary to the well-ordering, regulating and conducting the affairs of said company, and their directors, officers and servants.

Sec. 29. (2.) *Be it enacted*, That said corporation shall be capable in law to buy, receive by gift, hold, sell and convey real and personal estate, as hereinafter provided, make contracts, and have and use a common seal, and the same to alter and destroy at its pleasure; shall have seven directors, a president, and such inferior officers and agents as shall be deemed necessary by the board, from time to time, and, in the absence of the president, may appoint a president *pro tem.*

Sec. 30. (3.) *Be it enacted*, That the capital stock of said company shall be three millions of dollars, to be divided into shares of one hundred dollars each, which shares may be subscribed by corporations, cities, counties or individuals; and shall be deemed personal property, and may be transferable and transferred in such manner and at such times and places as the by-laws of said company shall direct; and it shall be lawful for said company to increase the capital stock of the same, from time to time, should it become necessary for the purpose of constructing and equipping the railroad hereby authorized to be constructed and equipped: *Provided*, that said company may commence the construction of said road, with all the powers and privileges contained in this act, whenever the sum subscribed to the capital stock shall exceed two hundred thousand dollars.

Sec. 31. (4.) *Be it enacted*, That the persons named in the first section of this act, or a majority of them, shall open, or cause to be opened, on the first day of April, 1858, books for subscription to the capital stock of the company, in the city of Memphis, Shelby county: in Covington, Tipton county; in Ripley, Lauderdale county; in Dyers-

burg, Dyer county, and in Troy, Obion county. If more than three thousand shares of stock shall be taken or subscribed, the stockholders shall have the power to make the shares as subscribed the capital stock of said company; and in case a greater amount of stock shall be subscribed, than thirty thousand shares, the stockholders or the board of the directors elected by them, shall reduce the same to that number, by striking off from the highest in succession in such manner that no subscription shall be reduced while one remains larger.

Sec. 32. (5.) *Be it enacted*, That the president and directors, who shall be shareholders, and who shall be chosen by the stockholders of said company, shall be chosen annually by said stockholders, at such time and place as shall be designated by the board, and shall hold their offices for the term of one year, and until their successors are elected and qualified; and the board shall have power to fill all the vacancies in its own body, to serve until the next regular session; and the said directors, five of whom shall be a quorum for the transaction of business, shall elect one of their number to be president of the board, (who shall also be president of said company.) They shall also choose a secretary and treasurer, who shall give bond, with security, to said company, in such sum as the directors may require, for the faithful performance of his trust.

Sec. 33. (6.) *Be it enacted*, That in case it shall happen at any time, that an election of directors shall not be made on the day designated by the laws of the company, when it ought to have been made, the board may appoint any other day when such election may be holden, in such manner as may be provided by the laws of the company.

Sec. 34. (7.) *Be it enacted*, That the corporators named in the first section of this act shall be the directors of the company until the first election, so far as to open, or cause to be opened, books for the subscription of stock at the time and places mentioned in the fourth section of this act; and they, or a majority of them, shall continue to direct the affairs of said company, until they shall be superseded by a board of president and directors, elected by the stockholders under this charter, to whom they shall deliver over all moneys, books, subscriptions and other papers belonging or appertaining to said company, received by them for the use and benefit of said company, and the first election for directors shall be held in Memphis on the first day of May, 1858.

Sec. 35. (8.) *Be it enacted*, That the president and directors shall be chosen after the first election, at a session or meeting of the stockholders to be held in one of the counties in or through which said road is proposed to be, or may be constructed, notice of which, appointing the time and place, shall be given by the directors, which notice shall be published not less than twenty days previous thereto in a newspaper published in each county through which said road may be intended to run, if a newspaper be published therein. Three judges of election shall be chosen by the board of directors previous to any annual meeting of the stockholders, who shall be stockholders but not directors at the time of such election, whose duty it shall be, after being duly sworn, to receive the votes of the stockholders at such elections for president and directors, openly count the same and declare the result, and shall furnish those elected with certificates of their election, which certificate shall be evidence of their authority to act

as such. The votes of the stockholders may be cast in person or by written proxy, signed by such stockholder, and every stockholder being present in person or by proxy at such election, shall be entitled to give one vote for each share of stock such person may hold, which has been entered in the name of such stockholder on the register of the Company, either as an original subscriber or as a transferee of the stock; executors, administrators and guardians, and other trustees shall be authorized to vote upon stock represented by them. No person shall be eligible to hold the office of president or director unless he shall be a stockholder, owning stock absolutely in his own right.

Sec. 36. (9.) *Be it enacted*, That the meetings of the stockholders may be called at any time during the interval between the annual meetings by the directors, or by the stockholders, owning not less than one-fourth of the stock, by giving thirty days notice of the time and place of the meeting, in the manner provided for the annual elections, and when any such meeting is called by the stockholders they shall sign their names to the call, and shall state the particular object of such meeting, and if at any such meeting thus called by the stockholders a majority in value of the stockholders are not represented in person or by proxy, such meeting shall be adjourned from day to day, not exceeding three days, without transacting business, and if within said three days stockholders having a majority of the stock do not attend, then the meeting shall be dissolved; but if a majority shall attend said meeting it shall be lawful for them to remove any director, president, secretary, treasurer, engineer, or other officer elected by the stockholders or the board, for good cause, and elect others

in their stead, who shall serve until the next annual election, and until they shall be superseded by their successors, and the president shall have power to call sessions of the board in case of emergency.

Sec. 37. (10.) *Be it enacted*, That the whole stock and property of said company, real, personal and mixed, and the issues and profits thereof, shall be holden in law and are hereby declared to be personal property, and the same shall be governed by the rules and laws governing personal property, in all cases, except as herein provided, and the said property and the profits arising therefrom, shall be vested in the respective shareholders, their heirs, executors, administrators and assigns, in proportion of their respective shares.

Sec. 38. (11.) *Be it enacted*, That the capital stock of said company shall be forever exempt from taxation, and the road with all its fixtures and appurtenances, including workshops, warehouses and vehicles of transportation shall be exempt from taxation for the period of thirty years from the completion of the road, and no longer.

Sec. 39. (12.) *Be it enacted*, That the railroad authorized by this act shall be commenced within seven years after the passage of this act, and shall be finished within twelve years thereafter, otherwise the charter herein granted shall be void.

Sec. 40. (13.) *Be it enacted*, That all contracts and agreements authenticated by the president of the board shall be binding on the company, without seal, or such other mode of authentication may be used as the company by their bylaws may adopt.

Sec. 41. (14.) *Be it enacted*, That said company shall have the exclusive right of transportation and conveyance of persons, goods, merchandise and produce over the said railroad, by them to be constructed, and that the charge of transportation and conveyance shall not exceed forty cents per hundred pounds on heavy articles, and fifteen cents per cubic foot on articles of measurement for every hundred miles; and five cents a mile for every passenger, and provided that said company may, when they see fit, farm out their right of transportation on said road, subject to the rates above mentioned.

Sec. 42. (15.) *Be it enacted*, That the board of directors may call for the payment of one hundred dollars on each share of stock in sums not exceeding two dollars in every thirty days; provided, that twenty days' notice be given of such call, in at least one public newspaper in the State in which any of the stockholders may reside, and a failure to pay, or secure to be paid, according to the rules of the company any of the instalments so called as aforesaid, shall induce a forfeiture of the share or shares on which default shall be so made, and all payments thereon; and the same shall vest in and belong to the company, and may be restored to the owner or owners by the board of directors, if they deem proper, on the payment of all arrears on such shares and legal interest thereon; or the directors may waive the forfeiture after thirty days' default and sue the stockholders for the instalments due, at their discretion.

Sec. 43. (16.) *Be it enacted*, That the board of directors shall once in every year, at least, make a full report on the

state of the company and its affairs, to a general meeting of the stockholders, and oftener if directed by a bylaw.

Sec. 44. (17.) *Be it enacted*, That the president, directors, clerks, agents, officers and servants of said company shall be exempt from military duty, except in case of invasion or insurrection, and shall also be exempt from serving on juries and working on public roads.

Sec. 45. (18.) *Be it enacted*, That the company shall have full power and authority to purchase and own such number of slaves as may be necessary for the construction of said road and for keeping it in repair. [Repealed by the war.]

Sec. 46. (19.) *Be it enacted*, That, if by decree, or otherwise, the said corporation shall be dissolved, the president and directors of said company are created trustees, with such powers only as may be necessary to collect the debts due the company, preserve the property, pay the debts, and distribute the property and effects of the company to those who may be entitled thereto under the charter.

Sec. 47. (20.) *Be it enacted*, That should the president and directors, or a majority of the whole number elected, consider it expedient for the purpose of aiding the stockholders or hastening the completion of the contemplated road, it shall be lawful for them to borrow money on the credit of said company, not exceeding five hundred thousand dollars at any one time, at any rate of interest not exceeding seven per cent. per annum; and the said company may issue such evidences of such indebtedness as may be deemed proper, and secure the same by giving a lien upon the property and assets of the company; and

the said company may sell said bonds or evidences of debt at such rate of discount and at such places as to them may seem advisable; and the said company shall also have power to indorse and guarantee the payment of bonds issued for the purchase of stock in said road, held by any city, county or town.

Sec. 48. (21.) *Be it enacted*, That the board shall fix the pay of directors and officers of the company, which shall not be reduced to take effect until after the next annual election.

Sec. 49. (22.) *Be it enacted*, That the said company are hereby vested with all the powers and rights necessary to the construction of a railroad from the City of Memphis, in Shelby County, Tennessee, to be run through said county of Shelby, Tipton, Lauderdale, Dyer and Obion to the State line of the State of Kentucky, in the direction of Cairo, in the State of Illinois; and from the point of intersection with said State line of said State of Kentucky, thence by and with the authority and concurrence of the General Assembly of the State of Kentucky, through the counties in the State of Kentucky lying on and bounded by the Mississippi river to the Ohio river, opposite to the city or town of Cairo, in said State of Illinois, so as to make said railroad a connecting and continuous line from the city of Memphis, aforesaid, through the States of Tennessee and Kentucky with the railroads in said State of Illinois, terminating at said city or town of Cairo, between the termini inclusive; with full power to construct branches from the main line to any point or points that may seem to be conducive to the country and to said railroad, to be determined by the president and a

majority of the directors of said company; and to establish such depots and stations at such point or points, and along the line of such branch roads as may by them be deemed necessary for the accommodation and transportation of freight and passengers; and in addition to the powers hereinbefore granted, said corporation shall have the following special defined powers, that is to say: First, to cause such examinations and surveys for the proposed railroad to be made, as may be necessary to the selection of the most advantageous route for the railroad, and for such purposes by their officers, agents and servants to enter upon the lands or waters of any person, but subject to the responsibility for all damages which they shall do thereto. Second, to receive, hold, and take such voluntary grants and donations of real estate and personal property as shall be made to it, to aid in the construction, maintenance and accommodation of such railroad, to be disposed as hereinbefore provided. Third, to purchase, by voluntary grants and donations receive, and take, and by its officers, engineers, surveyors and agents, enter upon, take possession of, and hold and use all such lands and real estate and other property as may be necessary for the construction and maintenance of its railroads and stations, with the branches, hereby authorized, depots and other accommodations necessary to accomplish the objects for which their corporation is created. Fourth, to lay out its road not exceeding two hundred feet wide, and to construct the same with the necessary tracks, side-tracks, switches, stations, depots, warehouses and buildings, and for the purposes of cuttings, embankments, and procuring stone, gravel and groundwork, take as much more land within the limits of its charter, in the manner provided hereinafter, as may be

necessary for the proper construction and security of the road. Fifth, to construct their road and branches across any stream of water, water course, road, highway or railroad so as not to interfere with the free use of the same, and in such manner as to afford and leave in good repair and well constructed for public use, all such streams of water, water courses, roads, highways, streets and alleys, and shall restore the stream of water, road or highway, street or alley thus intersected, to its former good condition, or in a sufficient manner not to have impaired its usefulness, or injure its franchise. *Provided*, that should it become necessary for said company to bridge over any navigable stream or river, in the construction of said railroad or its branches, it shall be the duty of the company to construct the same of sufficient height and span to permit at high water the free passage of steamers and other crafts in the channel of the river, and so as not to obstruct the navigation in low water, or so to construct said bridges, if piers be used, as not to obstruct the channel of the river, and to construct sufficient draws in all such bridges for the passage of steamers and other craft in the channel of the river at all stages of the water, and shall, at their own expense, by day and by night, open such draws for the passage of steamers and other craft on the approach of the same, without unnecessary delay, and shall, moreover, be liable for all damages to individuals navigating such water courses, in consequence of the erection of such dam, not strictly in conformity to the authority hereby granted. *Provided*, said company may erect and use such temporary piers and scaffolding as may be necessary for the construction of said bridges, to be removed by it, so soon as the work is done, and earlier if they can be dispensed with

without retarding the work. Sixth, to cross, intersect, join and unite its railroad and branches with any other railroad before constructed, or being constructed or located at any point on the route of such railroad or branches, with the necessary turn-outs, side-lines, switches, depots, buildings, warehouses, stations, and other conveniences in furtherance of the objects of such construction. Seventh, to consolidate its road with any other railroad running in the same direction, in whole or in part, or connected with the line at either terminus, on such terms as may be agreed upon between the constructing parties, and to make through arrangements for transportation of freight and passengers with other railroad companies: *Provided*, That no such consolidation or through arrangement shall be made unless two-thirds of the board elect shall concur therein; and in such case, the vote shall be taken by ayes and noes, and entered upon the record of the proceedings of the board. Eighth, to change the line of the road and its branches whenever a majority of the directors shall so determine, but such shall not be made to vary the general route of the road, not to change the terminus, or the points named in this charter, unless authorized by future legislation. Ninth, to erect and maintain all necessary and convenient buildings, stations, depots, fixtures for the accommodation and use of passengers, freight and business, and to regulate the time and manner in which passengers and freight shall be received and transported, and the tolls and fares to be charged therefor, and to take, transport, carry and convey passengers and freight on their road, and branches, by steam or other power, and receive toll and compensation therefor.

Sec. 50. (23.) *Be it enacted*, That said company, by their officers, engineers, servants and agents, shall have full power and authority to enter upon all lands and tenements through which they judge it necessary to make said road or branches, and lay out the same according to their pleasure, so that neither the dwelling house, yard or garden be invaded without the consent of the owner or proprietor thereof; and if the company cannot agree with the owner of the land, or if such owner is incompetent to contract, or is a non-resident of the State, so that the title or right of way cannot be obtained by said company to the necessary lands upon which to construct said road and branches, not exceeding two hundred feet wide, and to the necessary grounds for depots, turn-outs, switches, stations and necessary conveniences, upon which to transact the business of the railroad and branches, either party may apply by petition to the Circuit Court of the county in which the lands lie, giving five days' notice, if the owner of the land reside within the county, and twenty days' notice if he reside in any other county in the State, and by advertising in some newspaper printed in the county where the lands lie, if he reside out of the State, or, if no newspaper be printed in the proper county, then by manuscript notice put up at the courthouse door twenty days, to appoint commissioners to assess the value and condemn the land for the use of said company, for the purposes aforesaid. And the court shall appoint guardians *ad litem* for idiots, infants, *femes covert*, insane persons, and persons without the State, who may be necessary parties to any such proceedings; and upon proof of the notice having been duly given, the court shall appoint five commissioners, disinterested freeholders of said county, who shall be sworn or affirmed justly and

impartially to value the lands proposed to be appropriated to the use of the road, who shall ascertain what damages the owner will sustain, if any, by the location of said road and grounds, and the appropriation of the same to the use of the company for the purposes of the road, always taking into consideration the benefit of the road to the owner of such lands, and the tendency the road will have to increase the value of the other lands of the owner; and said five freeholders, or any three of them concurring, shall, upon oath or affirmation, report to said court, as soon as practicable, the damages, if any, and if none are sustained, they shall report the fact; which report, if unexcepted to, shall be recorded; and if any damages are assessed, the money shall be paid into court by the company, and the report shall be confirmed by the court, and recorded, and shall vest in the company the fee simple of the lands so valued for said purposes: *Provided*, that the court may, for good cause shown by either party, set aside the report, and appoint other commissioners, who shall proceed in all respects as hereinbefore provided, and the like proceedings shall be had in the Circuit Court at the second report of the commissioners, which shall be final between the parties in the Circuit Court, but may be examined and reversed or affirmed upon matters of law, in the Supreme Court, or Court of Appeals, of the State.

Sec. 51. (24.) *Be it enacted*, That said company may enter upon any adjacent lands, and cut, quarry, dig, take, or carry away therefrom, any timber, stone, gravel or earth, which may be necessary in the construction or repair of said road and branches; *Provided*, they shall not, without the consent of the owner, cut down any fruit tree or trees pre-

served in any inclosure for shade or ornament, or take away any materials constituting any part of a fence or building on such adjacent lands; for all which materials, and for all incidental injuries done to grounds, woods, inclosures of crops, the company shall make to the owners a fair and reasonable compensation; and if the parties cannot agree upon the same, it shall be ascertained by three impartial freeholders, to be appointed by a justice of the peace of the proper county, at the application of either party, the opposite party having three days' notice of the application to the justice. The freeholders shall be sworn to do impartial justice between the parties; their award shall stand as awards made by order of court upon the rights of the parties, upon which the justice may enter judgment and issue execution, if within his jurisdiction as to amount; if over, he shall certify the proceedings, as in other cases, to the next court, to be proceeded as upon an award made by said court; *Provided*, that either party may have the proceedings corrected by certiorari and not by appeal; if the proceedings be quashed, the court may appoint other valuers, and cause justice to be done in the premises.

Sec. 52. (25.) *Be it enacted*, That the pendency of such proceedings in court, or before the justice or arbitrators to ascertain said damages, shall in no wise or manner hinder or delay the progress of the work; and no order shall be made, nor shall any injunction or *supersedeas* be awarded by any judge or court, to hinder or delay the progress of the work.

Sec. 53. (26.) *Be it enacted*, That it shall not be lawful for any person, or combination of persons, whatever, by open violence, or otherwise, to attempt to retard the ope-

rations of said company in prosecuting the undertakings as herein allowed; but such persons, or combinations of persons, so offending, shall be liable for all damages sustained by the company, and may be sued before any competent tribunal for each and every offence, and recover whatever damages they shall show they have sustained. And if any person or combinations of persons shall wilfully or maliciously destroy, or in any manner injure, damage, or obstruct the said railroad, or any bridge, or any vehicle used for or in the transportation thereof, such person or persons so offending shall be liable to be indicted therefor, and, on conviction, shall be imprisoned not more than six nor less than one month, and pay a fine of not less than thirty dollars, and shall be further liable to pay all the expenses of repairing the same; and it shall not be competent for any person so offending against the provisions of this clause, or any part of it, to defend himself by pleading or giving in evidence, that he was the owner, or agent, or servant of the owner of the land where such destruction, hurt, damage, injury, or obstruction was done or caused, at the time the same was caused or done.

Sec. 54. (27.) *Be it enacted*, That in the absence of any contract with the said company in relation to lands through which said road may pass, signed by the owner thereof, or by his agent, or any claimant or person in possession thereof, which may be confirmed by the owner, it shall be presumed that the land upon which the said road may be constructed, together with a space of one hundred feet on each side of the center line of said road, has been granted to the company by the owner thereof, and the said company shall have the good right and title thereto, and shall

have, hold and enjoy the same as long as the same be used for the purposes of the road, and no longer, unless the person or persons owning the said land at the time that part of the road which may be on said land was finished, or those claiming under him, her or them, shall apply for an assessment for the value of said lands, as hereinbefore directed, within five years next after that part of said road was finished. And in case the said owner or owners, or those claiming under him, or them, shall not apply for such assessment within five years next after the said part of this road was finished, he, she, or they shall be forever barred from recovering the said land, or having any assessment or compensation therefor; *Provided*, that nothing herein contained shall affect the rights of *femes covert* or infants until two years after the removal of their respective disabilities

Sec. 55. (28.) *Be it enacted*, That said company shall possess such additional powers as may be convenient for the due and successful execution of the powers granted in this charter, and for the successful construction and management of the work.

Sec. 56. (29.) *Be it enacted*, That this charter shall be amendable from time to time by the Legislatures of the States of Tennessee and Kentucky, whenever the president and directors shall unanimously petition for amendment, specifying in their petition the nature of such amendment; and when such amendment shall be adopted by the Legislature and submitted to the directory, and be accepted and adopted unanimously by the president and directors, they shall be obligatory on the stockholders, and not otherwise.

Sec. 57. (30.) *Be it enacted*, That the profits of the company, or as much thereof as the board of directors may deem advisable, shall, when the affairs of the company will permit, be semi-annually divided among the stockholders in proportion to the stock each may hold: *Provided*, the said company is hereby expressly prohibited from carrying on any banking operations, but may effect insurance on lives and property transported on the road.

Sec. 58. (31.) *Be it enacted*, That subscriptions to the capital stock of said company, and gifts and donations to said company, may be taken and received in cash, in subscriptions for work, the stocks or bonds of other dividend paying railroad companies, either in this or other States, at their cash value; and also real estate lying near the line of the road, or without this State, at cash value: *Provided*, that the stock and bonds of other dividend paying railroads shall not exceed in amount one million five hundred thousand dollars, nor shall the amount of the real estate exceed a like amount: *And provided further*, that the company shall be bound to sell the real estate taken as a subscription in stock, or by gift or donation to said company, and convert it into cash so soon as the same can be disposed of advantageously for the company, and that the proceeds arising therefrom shall accrue to the benefit of the company in the construction and management of their road.

Sec. 59. (32.) *Be it enacted*, That the lands authorized to be subscribed as hereby declared, shall be conveyed to the company by the subscriber by good and sufficient deeds in fee, free from all incumbrances, and with relinquishment of dower, when necessary, before any stock shall be issued for the same; and the stocks and bonds of other

dividend paying railroads shall be duly assigned by the legal holder thereof to the company, before any stock shall issue thereon, and all certificates of stock shall be indorsed with amount paid on the certificate, and at the time of payment.

Sec. 60. (33.) *Be it enacted*, That after said company shall be organized, they may cause one or more routes for the main road and the branches to be surveyed and estimated, preparatory to a final location and letting of the work, but before proceeding to let the work in whole or in part, the president and directors shall call a meeting of the stockholders and lay before them, in a report, the cost of the road as far as estimated, together with the amount of subscription obtained, and the right of way obtained, and the expenses incurred, and the probable cost of completing the road and equipping the same, with its probable business and dividends when completed, together with the prospect of obtaining sufficient stock or means to equip and complete the road; and a majority of stockholders in value may thereupon, at such meeting, by resolution which shall be entered upon the journals of the company, together with the vote thereon, have the right to order the expenses to be paid, the subscriptions cancelled, the real estate subscribed in stock to be reconveyed to the subscriber, and after which and after the business of the company shall have been settled up, the company shall be dissolved, but they shall have no right to dissolve such corporation before the expiration of one year from the time the books shall be opened for subscriptions, nor after one half million of dollars shall be subscribed or donated to the capital stock in lands or money, nor if the minority

will guarantee such additional subscriptions or donations as will make the sum of one half million of dollars.

Sec. 61. (34.) *Be it enacted*, That it may be discretionary with a majority of the directors at what point or points on said line they may commence first the work of grading said road, and the erection of superstructure for it, or the laying of the iron, but they shall fully consult and be governed by the interests of the road and a majority of the stockholders in it.

Sec. 62. (35.) *Be it enacted*, That the moneys subscribed by the citizens of Tennessee, whether by the State, counties, corporations or individuals, shall first be applied to the construction of the road within the limits of the State of Tennessee, and the money subscribed by the citizens of Kentucky, whether by the State, counties, corporations or individuals, shall first be applied to the construction of the road within the limits of the State of Kentucky, and that the money or moneys arising from gifts or donations, may be expended along any part of said line as shall be decided by a majority of the directors.

Sec. 63. (36.) *Be it enacted*, That it shall be lawful, after the first general election of directors, as herein provided for, for the board by a unanimous vote to increase the number of directors to the number of fifteen, and said fifteen directors may select the president from their own body, if they shall so prefer to do, and in the event they shall determine in all future general and annual elections of directors to increase the number to fifteen, then in that case, nine of the fifteen directors shall be residents of the State of Tennessee, three shall be residents of the State of

Kentucky, and three may be residents of any other State or States. This section shall not apply to the directors named in the first section of this act, nor to the first general election of president and directors.

Sec. 64. (37.) *Be it enacted*, That said company shall have the right to take, at the stations and storehouses they may establish and annex to their railroad, all goods, wares, merchandise and produce intended for transportation, or that shall have been transported and not removed by the owner, prescribe the rules of priority, and charge and receive such just and reasonable compensation for storage as they, by rules may establish, (which they shall cause to be published), or as may be fixed by agreement with the owner, which may be distinct from the rates of transportation; *Provided*, that the said company shall not charge or receive storage on goods, wares, merchandise or produce which may be delivered to them at their regular depositories for immediate transportation, and which the company may have power to transport immediately.

Sec. 65. (38.) *Be it enacted*, That inasmuch as the railroad contemplated by this charter lies part in the State of Tennessee and part in the State of Kentucky, and the object of this corporation being to make a through line of the same gauge between the termini, to avoid all transhipments and commissions, and thereby expedite and cheapen transportation, to be managed by one company, it is hereby declared that this act, so far as it proposes to incorporate said company with powers to construct said railroad and branches through said State of Kentucky, is only intended to operate after it shall have received the concurrence and been ratified and confirmed by the Legis-

lature of Kentucky; and should said State decline to ratify and confirm the same, so far as relates to the powers to construct and maintain that part of the road which lies in Kentucky, it shall be null and void to that extent; but it is hereby declared that this act shall be valid so far as relates to the State of Tennessee, from and after its passage, and shall take effect from and after its passage.

Sec. 66. (39.) *Be it enacted*, That nothing in this act shall be construed as giving any State aid to this or other railroad company; and nothing in this act shall be construed as extending to any other railroad company further time than now allowed for its completion in the whole or in part.

Passed, January 29th, 1858.

EXHIBIT "M."

CHAP. LXXXIII.

AN ACT to Amend the Charter of the Mississippi River Railroad Company, and for other purposes.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the eighth clause in section 22 of the charter of the Mississippi River Railway Company be so amended as to read as follows: "To change the line of its road and branches whenever a majority of the directors may so determine; and such change of line may permit a location of its northern terminus at a point or points as nearly opposite Cairo or Mound City, in Illinois, as may be found most practicable. *Provided*, that said road must be built in and through the counties named in the charter of said company;" and *provided, further*, that said road shall be located through the town of Dyersburg, in Dyer county, Tennessee.

Sec. 2. *Be it further enacted*, That said road shall pass through the town of Troy, in the county of Obion, if the citizens of said county may so elect.

* * * * * * * * * *

Passed, February 25, 1860.

EXHIBIT "N."

CHAP. XLVIII.

AN ACT for the benefit of the Winchester & Alabama Railroad Company, and for other purposes.

* * * * * * * *

Sec. 6. *Be it further enacted*, That the county court of any county through which the line of the Mississippi River Railroad is proposed to run, a majority of the justices in commission at the time concurring, may make a corporate or county subscription to the capital stock of said railroad company, of an amount not exceeding two-thirds of the estimated cost of grading the road-bed through the county and preparing the same for the iron rails; the said cost to be verified by the sworn statement of the president or chief engineer of said company. And after such subscription shall have been entered upon the books of the railroad company, either by the chairman of the county court, or by any other member of the court appointed therefor, the court shall proceed without further reference or delay, to levy an assessment on all the taxable property within the county, sufficient to pay said subscription; and the same shall be payable in three equal annual instalments, commencing with the fiscal year in which said subscription shall be made. And it shall be lawful for county court making subscriptions as herein provided, to issue short bonds to the railroad company, in anticipation of the collection of the annual levies, if thereby

construction of the work may be facilitated; and in all other respects, except as herein specially provided, the capital stock of said railroad company to be subscribed by counties, shall be governed by the general internal improvement laws of the State.

* * * * * * * *

Sec. 9. *Be it further enacted*, That this act shall take effect from and after its passage.

Passed, February 25, 1867.

EXHIBIT "O."

CHAPTER VI.

AN ACT for the benefit of the Mississippi River Railroad Company.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the sixth section of an act passed on the 25th day of February, 1867, entitled, "An act for the benefit of the Winchester and Alabama Railroad Company, and for other purposes," be and is hereby amended as follows, to-wit: That the subscription authorized in said sixth section to be made to the capital stock of the Mississippi River Railroad Company, by the counties along the line of said railroad, may be made at any monthly term of the County Courts of said counties, or at any special term of said courts; provided, that a majority of all the justices

in commission in the counties respectively shall be present when any such subscription is made; and provided, further, that a majority of those present shall concur therein.

Sec. 2. *Be it further enacted*, That the charter of the Mississippi River Railroad Company be and hereby is so amended as that the said company may commence the line of their railroad at any point on the line of the Memphis and Ohio Railroad, not exceeding twelve miles from the city of Memphis; and the said Mississippi (River) Railroad Company are hereby authorized to enter into such contract with the said Memphis and Ohio Railroad Company, for entering the city of Memphis over the latter company's track, and for the use of a common depot, as may be convenient and profitable to the two companies.

Sec. 3. *Be it further enacted*, That this act shall take effect from and after its passage.

Passed, November 5, 1867.

EXHIBIT "P."

CHAP. LXIX.

AN ACT granting certain powers to existing Railroad Corporations.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That every existing railroad corporation in this State, whether created under a general or special law, shall have the right and the power to acquire by purchase, or other lawful contract, and have, hold, use, and operate any railroad with its franchises belonging to any other railroad corporation; and likewise to have, hold, use, and operate any such railroad with its franchises which it may have heretofore purchased or acquired; and also the power to borrow money and to issue its bonds therefor, or for any other indebtedness or liability which it may incur, or have incurred in the exercise of its lawful purposes, and to secure the payment of such bonds, with the interest thereon, by a mortgage of the whole, or any part of its railroad and equipments, and other property and franchises, containing such provisions as its directors shall approve; and also the power to consolidate itself with any other railroad corporation whose road shall connect with or intersect the road of such existing railroad corporation, or any branch thereof; and so to consolidate itself upon such terms and conditions and under such corporate name as shall be agreed upon in writing between such corporations respectively; *Provided*,

that nothing herein contained shall affect or impair in any way any mortgage, right, lien or priority of the State of Tennessee, or the rights of any creditors of such corporations; and that no such consolidation shall be consummated, or be complete, until it and the terms and conditions thereof shall have been approved by a majority of the stockholders of such consolidating companies respectively; and *provided further*, that the agreement for such consolidation, together with the evidence of the approval thereof by such stockholders, shall be filed in the office of the Secretary of State.

Sec. 2. *Be it further enacted*, That no railroad incorporation indebted to the State of Tennessee on account of its bonds issued to such road in aid of its construction, shall be entitled to the benefits of this act until such road shall have fully paid off and discharged such indebtedness; *Provided*, that this section shall not have the effect to impair or repeal any act passed by this General Assembly, but the same shall apply alone to the provisions of this act. And that this act shall take effect from and after its passage, the public welfare requiring it.

Passed December 11, 1871.

JAMES D. RICHARDSON,
Speaker of the House of Representatives.
JOHN C. VAUGHN,
Speaker of the Senate.

Received at Executive Office, December 12, 1871, and approved December 12, 1871.

JOHN C. BROWN,
Governor.

EXHIBIT "Q."

THE STATE, EX REL. ROSS,
v.
ANDERSON COUNTY. } Opinion.

This is a petition for a *mandamus* from the Circuit Court of Anderson county, filed by the relator against the county court of said county, to enforce a levy of taxes for the payment of certain interest coupons issued by the county in January, 1856, and within three successive years thereafter, with certain county bonds, in discharge of the county subscription of stock in the Knoxville and Kentucky Railroad Company. A fiat was obtained for an alternative writ of *mandamus* from one of the circuit judges of this State on the 31st of December, 1873, and the petition filed on the 5th of January, 1874. An amended petition was by leave of the court filed at the June term, 1874, of the circuit court of said county. The petition states, in substance, that the county of Anderson, on account of said subscription, issued about one hundred thousand dollars of its bonds about January, 1856, and within three years thereafter, in sums of five hundred dollars and one thousand dollars each, payable thirty years from date, with coupons or interest warrants attached for the payment of interest semi-annually, at the rate of six per cent. per annum. That the relator is the owner and bona fide holder for value of seven of said bonds, amounting to $6000, and that fourteen of the interest coupons were due at the time of filing the petition, and fourteen would fall due on the 1st

January, 1874. That he had made demand of payment of the county trustee, and of the justices composing the said county court. That the said trustee refused to pay, stating that he had been so ordered by the court; and that the said justices had replied that said coupons would not be paid. That said bonds and coupons are made payable to the Knoxville and Kentucky Railroad Company, or bearer, and were issued by authority of law, as they purport on their face, and that there were statutes which authorized their issuance, and made them all obligatory on the county. The bonds and coupons are set forth and described by dates, numbers and amounts, and it is stated that the petitioner is the bona fide holder for value of all said coupons as described.

The petition contains this averment: "That said bonds or warrants have been recognized by the county court of said county as a valid debt against said county, from the time they were issued, until a short time previous to the commencement of this suit; and that the county has paid all the interest due upon said bonds up to the 1st of July, 1872, including the interest due at that date. The county court has levied and collected taxes for the payment of said coupons or interest warrants, and the citizens of said county have paid said taxes for that purpose, and neither the county court, nor any citizen of said county, prosecuted to a successful termination any suit in law or equity, to prevent the issuance of said bonds, nor to prevent their negotiation by the Knoxville & Kentucky Railroad Company; and there never was any proceeding instituted, either by the county or any citizen thereof, to have said bonds or coupons declared void, nor to prevent their issu-

ance or negotiation, but the same have been treated by the county court and the citizens of said county as a valid debt against said county, from the time they were issued, until after the 1st of July, 1872, and said county has paid the relator all the interest that has accrued on the bonds mentioned in his petition, ever since he has received said bonds, except the coupons or interest warrants mentioned in said petition." Upon the hearing of the cause by the Circuit Court the peremptory mandamus was refused and the petition dismissed. The relator has appealed.

There are several minor objections taken to the proceeding by the defendant upon argument in this court, which we do not feel called upon to discuss further than to observe that in our opinion they would interpose no legal barrier to the relief sought.

Upon the case made in the petition it is not necessary that the demand should have been merged into judgment, nor is it essential that the county trustee should be made a party. The justices of Anderson, constituting the county court of said county, are the proper parties defendant. Nor, in our judgment, does the fact that, at the time the fiat for the writ was obtained, some of the coupons were not due, interpose, under the facts, any serious ground for refusing the relief, even as to them, as it appears, on the face of the petition, that these coupons would fall due within a few days, and, as the Record discloses, they did actually mature before the petition itself was filed in court. In regard to several of the coupons, payable at the Bank of America, it is not fatal to the proceeding that the petition does not aver a presentment there, even if such presentment, in this kind of case, were essential, inasmuch as

the petition does aver a sufficient excuse in the positive and peremptory refusal of defendants to pay any portion of the coupons.

The main ground of defence presents questions of much public importance, and of more difficulty than the preliminary questions thus briefly disposed of. It is insisted, that the county of Anderson is not liable for these bonds and coupons, because they were issued without authority of law. It is certainly clear that the county had no right to contract this debt without legislative authority. But we may observe, at the threshold, that, after the solemn obligations of the county have been negotiated, and thrown upon the commerce of the country, into the hands of *bona fide* holders, who, so far from having any notice of any supposed illegality, were encouraged by the county itself, through a series of years, to give them implicit credit, it would require a very grave departure from legislative restrictions to justify the courts in exonerating the county. Indeed, the doctrine of ratification itself would be a legal panacea to all manner of mere irregularity, and must be fatal to the defence, unless it can be shown that the issuance of the bonds in question was, *ab initio*, void. By the act of 1852, ch. 117, the several counties of this State were authorized to subscribe for stock in any railroad enterprise located, or to be located, through said counties. This act initiated our system of railroad improvements, and is very liberal in its terms. It prescribed the mode of subscription, how the subscription was to be paid, and gave the circuit courts the power to enforce its provisions by the writ of mandamus against the county courts.

The act of 1852, ch. 191, authorized certain counties to

subscribe stock in any chartered railroad located through said counties, in any amount determined upon in the manner prescribed by law, and *to issue bonds* for the amount of stock so subscribed. The bonds to bear six per cent interest—payable semi-annually, and to fall due in not less *than ten nor more than thirty years from date*. The act of the 18th February, 1854, ch. 180, applied the foregoing provisions expressly to the county of Anderson. The second section of said act provides that the acts of any of said counties in *voting stock in railroads*, and to issue county bonds for the same, not heretofore provided for by law, shall hereby be declared as valid and binding as though said acts had been strictly in accordance with law. The Knoxville and Kentucky Railroad Company was chartered in 1852, and was a railroad in which the county of Anderson might take stock under the act of 1852, ch. 117. But this act of 1852, ch. 117, did not authorize bonds to be issued. We take it to be a sound principle, however, that a county, like another corporation, having issue the commercial evidences of it, in such form as may be satisfactory to the parties. Under this act of 1852, ch. 117, the county court proceeded at the March term, 1853, to provide for a subscription of stock in said company, by ordering an election to ascertain the will of the people as the law prescribed; in which election the question to be voted upon was whether the county would subscribe one hundred thousand dollars of stock in said company," to be payable in six *annual instalments*, commencing in 1854. The act of 1852, chapter 117, provided that only 33⅓ per cent. of the subscription of any county should be collected annually. The 12th section of said act provides that upon unexpected demand, when there is no railroad tax on hand,

the county court may anticipate the collection of said taxes by the issuance of county warrants, payable as desired by the board of directors, bearing interest at the rate of six per cent. per annum, &c., but the issuance of bonds was not expressly authorized until done by the act of 1852, ch. 191, which restricted the time of their maturity to not less than ten years, nor more than thirty years after date.

We have seen that the act of 18th February, 1854, ch. 180, applied these provisions expressly to Anderson county. It seems, however, that the county court took no further action upon the proceeding of its March term, 1853, until the July term, 1854—in doubt, perhaps, of the validity thereof; but the Legislature having on the 18th February, 1854, by said ch. 180, declared said election and proceeding lawful and binding, the county court in July thereafter took final action in the matter by subscribing the stock, as the sheriff had reported the people as voting for, and ordering the issuance of coupon bonds, payable at thirty years, with semi-annual interest, just as the law required: but providing by the order that the whole shall be paid in six annual instalments. This last provision, however, was not incorporated in the bonds. Now, it is earnestly argued that these bonds are absolutely void, even in the hands of the relator, and all other persons who have bought them in good faith, because, as alleged, the subscription of stock was on condition that the whole debt be paid in six annual instalments, whereas the bonds postpone the payment for thirty years. This would seem to be an anomalous position for a debtor, to object to an indulgence of thirty years, upon a debt at simple interest, when money is so productive and valuable, and at a time when

most of that class, both among natural and artificial persons, are importunate for time. But it is nevertheless an argument pressed with great ability, and which, upon a hasty view of the question, does not lack the virtue of plausibility. The railroad subscription laws require, among other things, that in the levy and collection of taxes for the liquidation of the semi-annual interest, a certain amount shall be also levied and collected, to constitute a sinking fund for the ultimate extinguishment of the bonds.

This sinking fund might be invested in some productive way, and it is certainly demonstrable that the county, in the meantime, increasing in taxable wealth, population, and material prosperity, could not be materially injured even by a much longer postponement of the day of payment. The bonds were, however, afterward issued in the exact form prescribed by law, impressed at their issuance with the sanction of the popular approval, and nurtured into credit and confidence by the recognition and patronage of the county which issue them for a long series of years. If, as the worshipful justices propose in the order of July term, 1854, they are still disposed to extinguish this debt in six annual instalments, we presume the holders of these bonds will not be found impracticable, or refractory in receiving their honest dues. But with a full sense of the great magnitude of the interest involved, we have no hesitation in saying, that so far as the rights of these parties have been unfolded to us by the record, there is no ground assumed in the argument which, in a court of conscience or a court of law, can relieve the county of Anderson from this obligation. If the county had been defrauded in the issuance of these bonds; if it had been done without a

vote of the people as to the subscription; or, indeed, if the statutes had not been substantially complied with, then the case would be presented in a different aspect. But we have here a submission of the question of subscription to the popular vote; the evidence of its endorsement at the polls; the irregularities of that proceeding cured by subsequent legislation; the issuance of these bonds by the constituted authorities of the county; their circulation, from hand to hand, as negotiable commercial paper; their recognition by the court and the people as valid obligations for a period of sixteen years; and after all this we are asked to declare these bonds unlawful in the hands of innocent holders, who have in good faith invested their money in them, because the bonds are made payable in thirty years, as the law directs, rather than in six annual instalments, as it is insisted the people intended. If such was the popular intention, why permit the bonds to issue in the present form? why allow them to be negotiated? why submit quietly, from year to year, for this long period, to annual drafts of the railroad tax, with full knowledge that the original purpose as to payments in six instalments had been perverted and defeated by the issuance of thirty-year bonds?

A county under our law is a corporation. The citizens are the corporators; the county court the agency through which this mortal immortal acts and speaks and hath its being. Like other artificial beings or natural persons, it can ratify the unauthorized acts of its agents. In this case the county of Anderson has done this thing. There can be no question that it was competent for the Legislature to cure, by subsequent enactment, any mere irregularities in

the election of 1853. (16 Wall., 644, 8 Ann. R., 87–108.) We hold that these bonds and coupons were lawfully issued, and that the mere irregularities referred to will not be allowed to defeat the rights of the holders. They are payable to bearer, and transferrable by delivery, and subject to the same rules as to the rights of the holders as negotiable bills and notes. (Lexington v. Butler, 14 Wall., 295; Mercer County v. Hackett, 1 Wall., 83.) In the latter case it was said: "Where a county issues its bonds payable to bearer, and solemnly pledges the faith, credit and property of the county under the authority of law, referred to on the face of the bonds by date for their payment, and those bonds pass bona fide into the hands of holders for value, the county is bound to pay them. It is no defence to the claim of such a holder that the act referred to in the face of the bond authorized the county to issue the bonds only and subject to certain restrictions, limitations and conditions, which have not been formally complied with. (1 Wall., 83.)

In the case of Pendleton Co. v. Army, 13 Wall., 298, it is held that a county issuing bonds to a railroad company in payment of stock in the road, which subscription the county was authorized by legislative act to make, and to pay for by the issue of bonds, only after certain things directed had been performed, said county may be estopped against asserting that the conditions have not been complied with, * * * and an estoppel would take place when the county had received the proper amount of stock for which the bonds were issued, had held it for seventeen years, and was actually enjoying it at the time when pleading a want of authority to subscribe.

13 Wall., 298.

And so in the case of Grand Chanter v. Winegon, 15 Wall., 356, it is held that in a suit against a municipal corporation, by a *bona fide* holder of its bonds, whose title accrued before maturity, the corporation cannot show by way of defence, if the legal authority to issue the bond is clear, a want of compliance on its part with formalities required by the statute, or show fraud in their own agents in issuing them.

15 Wall., 356.

This is a strong case, and bears much analogy to the case in judgment, if not in the facts, in the principles applicable to both alike. In the case in judgment there can be no pretence that the county of Anderson was not authorized by law to make the subscription, and to issue the bonds in controversy. No fraud is complained of in the county court, but a mere mistake or irregularity as to the time of payment of the bonds. The amount of the subscription was voted by the people, and *this is the vital thing.* The bonds, as issued, follow the law as to the time of payment, whereas, a payment in instalments, as proposed, would have been in derogation of the law, which requires such bonds to be made payable not less than ten nor more than thirty years after date.

Act 1852, ch. 191, I. 12. Act 1853, 4, ch. 180.

It will be seen by reference to these acts, that the bonds in controversy were issued in exact and literal compliance with the statutes. They have gone into the hands of *bona fide* holders. The county of Anderson has received the consideration, and has estopped itself from impeaching their validity, except by showing a want of lawful author-

ity to take the stock and issue the bonds. This they have failed to do. We might have contented ourselves by resting this case upon the high authority of the Supreme Court of the United States, that the bonds on their face import a compliance with the law under which they were issued, and the purchaser was not bound to look further for evidence of a compliance with the condition to the grant of the power. Commissioners, &c., v. Aspinwall, 215. But in view of the great importance of the questions involved, we have met them as represented by the able argument of the counsel for the county of Anderson.

Reverse the judgment, and let a peremptory mandamus be awarded.

SNEED, J.

Supreme Court of United States

TIPTON COUNTY
No. 75 vs.
ROGERS' LOCOMOTIVE AND MACHINE WORKS.

THE SAME
No. 76 vs.
NORTON, SLAUGHTER & CO.

THE SAME
No. 77 vs.
J. T. EDMUNDS & CO.

In Error to the Circuit Court for the District of West Tennessee.

BRIEF FOR DEFENDANTS IN ERROR.

ESTES & ELLETT,

Counsel for Defendants in Error.

Tracy & Co., Printers.

Supreme Court of United States

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BRIEF FOR DEFENDANTS IN ERROR

STATEMENT OF THE CASE.

The questions in the three above entitled causes being the same, only one of the records has been printed, to-wit, that in the first named case.

This suit was brought to recover the amount of fifty bonds of the county of Tipton, for $500 each, payable to the Mississippi River Railroad Company, dated January 1, 1869, and due January 1, 1873, with six per cent. interest, which bonds were issued and delivered to the said Railroad Company on the 21st day of July, 1869.

There was a demurrer to the declaration, which was overruled, and pleas were then filed to the merits, on which the trial was had, and verdict and judgment were given for the plaintiffs. (Record p. 9.)

It is settled in this court that pleading over to a declaration adjudged good on demurrer, is a waiver of the demurrer.

Stanton vs. Embry, 93 U. S. 453, and numerous cases cited.

The bonds are set out in the bill of exceptions. (Record p. 10). They purport to be "Issued under and by virtue of section 6 of an act of the Legislature of the State of Tennessee, passed February 25th, 1867; amended on the 12th day of February, 1869." They are payable to the Mississippi River Railroad company, or bearer; and they recite that they are "issued by Tipton county in payment of a subscription of $200,000 to said Railroad company, made by the county court of said county, under the authority of the acts above recited."

It was admitted that the bonds were properly executed, and that they were delivered to the Railroad Company on the 21st day of July, 1869, under the orders of the county court, and that certificates for $200,000 of the stock were then issued to the county, and received from the company. (Record, 11.)

On the part of the defendants, proof was given tending to shew fraud, coercion, intimidation and bribery on the part of the Railroad Company in the procurement and issuance of the bonds, and that these facts were unknown to the county court until February, 1875.

There was also proof tending to show that the plaintiffs received the bonds in suit from the Paducah and Memphis Railroad Company, after they were overdue.

It was admitted that the subscription was made, and the bonds issued, without a vote of the people having been taken on the subject. Record p. 13,

Plaintiffs then introduced the record of the proceedings of the county court of Tipton county from February term, 1869, to July, 1873, (Record pp. 13 to 39), showing the original subscription; the issuance of the bonds; the levy of the tax to pay the instalments due in 1870, 1871, 1872 and 1873; the repeated appointments of a

collector of said tax; the monthly reports of the collector showing the amounts collected and applied to the payment of the bonds; the arrangement to extend the time to ten years instead of five, and the appointment of certain members of the court to represent the stock in all meetings of stock holders, and in all elections of directors, until further orders of the board.

It was proved that in January, 1872, the county voted this stock in favor of the consolidation of the company with the Paducah and Gulf Railroad Company, under the name of the Paducah and Memphis Railroad Company, and that after the consolidation was effected, the certificates were surrendered, and certificates of a like amount of stock in the new company were received in their place; and that the county voted this new stock, in a meeting of stockholders of the consolidated company, in favor of the resolution under which a mortgage of $1,951,000 was put on the consolidated road. (Record p. 41).

There was also proof to the following effect, to-wit: In 1871, negotiations were opened for a consolidation of the Mississippi River Railroad Company with the Paducah and Gulf Railroad Company, then owning and operating a completed road from Paducah to Troy, 63 miles, and being free from debt. The latter company would not agree to the consolidation unless assured that the county bonds held by the other company, would be paid without trouble. The Mississippi River Railroad Company therefore appointed Norton, the President of the Paducah and Gulf Company, their agent to present to the county court of Tipton county a proposition to extend the payment to ten years, on condition that a tax should be immediately levied and collected for the amount then due under said offer, and that the county court would annually, during said extension, levy and pay over the amount to fall due in each year. Norton stated to the said county court, in open court, that *if there was any question about the bonds of said county*, or if they would not accept and comply with the proposition of the Mississippi River Railroad Company, the proposed consolidation would be defeated. The court thereupon accepted the proposition, and levied the tax to pay the first instalment, and urged Norton to favor the consolidation. The decision of the question depended upon Norton's vote. He did favor the consolidation, as he would not have done but for the action of the county court, and the consolidation was effected.

Tipton county voted its stock in the Mississippi River Railroad Company in favor of the consolidation, and afterwards ex-

changed it for stock in the consolidated company, and has paid to the consolidated company, called the Paducah and Memphis Railroad Company, the sum of $38,046.96 on account of said bonds and coupons. These payments were made from Nov., 1872, to July, 1873. (Record pp. 40, 41).

There was also proof that the particular bonds in suit in this case were, long before maturity, pledged by the Mississippi River Railroad Company as security for a loan of money made to it. When this loan fell due, the note of the *Paducah and Gulf Company* was given to renew it for 90 days, the same collaterals being retained. This note at maturity, was paid by Norton, Slaughter & Co., at the request and for the benefit of the *Paducah and Memphis Railroad Company*, the new consolidated company, and the same collaterals were held by Norton, Slaughter & Co. as security for their advances for the last named company. This company (the Paducah and Memphis) took up these county bonds from Norton, Slaughter & Co., by substituting its own first mortgage bonds, and then passed the bonds in question to the plaintiffs as collateral security for locomotive engines, and afterwards made an absolute transfer of them to plaintiffs in payment of the account for the engines. (Record, 41).

There was also proof that since the consolidation, about half a million dollars had been expended in Tipton county by the Paducah and Memphis Railroad Company; that the road from Memphis to Covington, the county seat of Tipton county, a distance of 37 miles, 21 of which are within said county, had been built and equipped, and that trains had been running regularly thereon since June 25, 1873; and that from Covington to one and one-fourth miles north of Ripley, in Lauderdale county, the road had been graded and bridged, ready for the cross-ties and rails. (Record 41, 42).

CHARGES OF THE COURT.

At request of plaintiffs the following charge was given to the jury, to-wit:

"If you credit the testimony, and from it believe that Mr. Norton, as President of the Paducah and Gulf Railroad Company, in October, 1871, appeared before a duly authorized county court of Tipton county, and in open court fully explained to it that a consolidation was contemplated between his company and the Mississippi River Railroad Company, and that such consolidation depended upon the fact whether the bonds in controversy were to be paid by the county, and whether it would proceed to levy a tax for

the same; and then and there presented the proposition of the said Mississippi Company recited in the resolution of that date, passed by the said county court; and that the said Paducah company was then solvent, and owned and operated a railroad from the town of Paducah, in Kentucky, to Troy, in Tennessee, and that no portion of the railroad in Tipton county was then completed, and that the purpose of said consolidation was to complete said road in Tipton county, and to connect it with the line of said Paducah and Gulf road; and that said road has since been completed from the town of Covington, in said county, to the city of Memphis, being a distance of 37 miles, twenty one whereof are in said Tipton county; and that said Norton communicated to his company the action of said county court at its said October session of 1871, and that in consequence thereof, and in reliance thereupon, said consolidation took place, whereby said Paducah and Memphis Railroad Company was created; and that said latter company thereafter completed the road from Covington to Memphis, and has regularly run and operated the same from the 25th of June, 1873, to this date; and that the plaintiffs in this action, in the ordinary course of trade, and without any notice of any ill faith in the procuration of said bonds, gave full value therefore to the said Paducah and Memphis Railroad Company, by furnishing engines to be employed on said road, and that said Paducah and Memphis Railroad Company received said bonds without any notice whatsoever of any fraud in their issuance, then the fact that one or more of the Justices of said county court, who originally voted for said subscription of stock, were induced so to do by corrupt means, and all other proofs or matters of fraud, constitute no defence to this action; to which charge the defendant then and there excepted, and such exceptions were duly noted. (Record 43.)

All the charges asked by the defendant below were given by the court, subject however, to the instruction given as above on the request of the plaintiff; the court adding, "if one citizen about to buy a demand against another, applies to him in good faith to ascertain whether the demand will be paid, and is informed that it will be, and buys in reliance upon such information, the party admitting his obligation will not be permitted to defend, although the admission was made in ignorance of a valid defence." (Record 44.)

The record (p. 45), shows that the introduction of the bonds sued on as evidence was objected to for several reasons, to-wit:

1. They purport to have been issued under the act of Feb. 12, 1869, which act was not passed until after the meeting of the court which ordered their issuance.

2. They are dated January 1, 1869, before the passage of said act of Feb. 12.

3. The act of Feb. 28, 1867, did not authorize the issuance of said bonds, but only of "short bonds," in anticipation of the annual levies.

4. The proceedings of said county court, at its February term, 1869, were at a time and by a tribunal not permitted by the constitution and laws of Tennessee.

5. The bonds purport to be issued by the county court, instead of the county.

6. The acts of Feb. 25, and Nov. 5, 1867, are unconstitutional and void, for the reasons, (1) that they are partial laws, and not the "laws of the land;" (2) that they suspend general laws in favor of individuals; and (3) that said acts are not a part of the charter of the Railroad Company.

These objections were overruled and the bonds admitted in evidence, to which the defendant excepted.

"The Mississippi River Railroad Company," was chartered by sections 28 to 66 inclusive, of an Act of the General Assembly of Tennessee, entitled, "An act to charter the Greenville and North Carolina Railroad Company; to amend the charter of the Eagleville, Unionville and Shelbyville Turnpike Company; and *to incorporate the Mississippi River Railroad Company*, and for other purposes," passed January 29, 1858. Chapter 42 of Private Acts of Session of 1857–8, page 68.

By section 49 the company is "vested with all the powers and rights necessary to the construction of a railroad from the City of Memphis, in Shelby county, Tennessee, to be run through said county of Shelby, Tipton, Lauderdale, Dyer and Obion, to the State line of the State of Kentucky, in the direction of Cairo, in the State of Illinois;" and thence, with the authority and concurrence of the State of Kentucky, to the Ohio River, opposite Cairo."

By section 30 it is enacted, "That the capital stock of said company shall be three millions of dollars, divided into shares of one hundred dollars each, *which shares may be subscribed by corporations, cities, counties, or individuals;*" and by section 62 it is enacted

"that the monies subscribed by the citizens of Tennessee, *whether by the State, counties, corporations, or individuals* shall first be applied to the construction of the road within the limits of the State of Tennessee."

By section 47 the said company, in addition to the power to borrow money, to issue such evidences of indebtedness as may be proper, and to secure the same by giving a lien on the property and assets of the company, is also expressly empowered to "*endorse and guaranty the payment of bonds issued for the purchase of stock in said road held by any city, county or town.*"

Section 50 prescribes the mode of proceeding to obtain the right of way, by condemning land for that purpose, where the company cannot agree with the owner.

The right of the counties on the line of the Mississippi River Railroad Company to subscribe for stock in said company, was further regulated by an amendment of the charter, passed February 27, 1867. This act is entitled "An act for the benefit of the Winchester and Alabama Railroad Company, and for other purposes," and the 4th, 5th, 6th, 7th and 8th sections relate entirely to the Mississippi River Railroad Company.

The 4th section fixed the number of Directors at nine, while the road should be conducted within the limits of Tennessee; and authorized an increase to thirteen when the construction in Kentucky should be commenced.

The 5th section authorized the condemnation of land for machine shops, car factories, and other works; and provided that "in such condemnation the same rules shall be followed as are prescribed in *section 50 of the Act to which this is an amendment*," being the original charter of the company.

The 6th section, which is the one relating to the stock subscription, is as follows:

SECTION 6. "*Be it further enacted*, That the County Court of any county through which the line of the Mississippi River Railroad is proposed to run, a majority of the justices in commission at the time concurring, may make a corporate or county subscription to the capital stock of said railroad company, of an amount not exceeding two-thirds the estimated cost of grading the road-bed through the county and preparing the same for the iron rails; the said cost to be verified by the sworn statement of the President or Chief Engineer of said company. And after such subscription shall have

been entered upon the books of the railroad company, either by the chairman of the county court, or by any other member of the court appointed therefor, the court shall proceed, without further reference or delay, to levy an assessment on all the taxable property within the county sufficient to pay said subscription; and the same shall be payable in three equal annual instalments, commencing with the fiscal year in which said subscription shall be made. And it shall be lawful for county courts making subscriptions as herein provided, to issue short bonds to the railroad company, in anticipation of the collection of the annual levies, if thereby construction of the work may be facilitated. And in all other respects, except as herein specially provided, the capital stock of said railroad company to be subscribed by counties, shall be governed by the General Internal Improvement laws of the State."

Sections 7 and 8 of said Act amend the charter in other respects not material to be noticed.

By the 28th, 29th, and 30th sections of another act, entitled "an act to incorporate the Raleigh Mineral Springs Hotel Company," passed February 12, 1869, Ch. 45, page 203, 210, the preceding acts were amended as follows:

Sec. 28. *Be it further enacted*, That the stock authorized to be subscribed in the Mississippi River Railroad Company, by the county courts or county commissioners of the counties along the line of said railroad, may be payable in not exceeding six annual instalments, instead of three, as now provided by law.

Sec. 29. *Be it further enacted*, That the counties shall own, and have issued to them, the full amount of the stock in the Mississippi River Railroad Company, which the county courts or county commissioners are now by law authorized to subscribe, whether said subscriptions be paid in cash or in county bonds.

Sec. 30. *Be it further enacted*, That all stock subscribed by counties under the foregoing provisions, and all stock subscribed or paid for in money or service by individuals subsequently to May 15, 1865, be, and the same is hereby declared and constituted to be, a preferred stock of said Mississippi River Railroad Company, and all other stock, if any, shall be called the common stock of said company; and the preferred stock shall be entitled to preferred dividends equal to ten per cent. per annum from the net earnings of said road, and after paying construction account, and then, if there be any excess of earnings undistributed, it may be

divided between the preferred and common stock, share and share alike.

By the second section of another Act, passed February 19, 1869, Chapter 43, page 191, the Railroad Company was authorized to appoint its own Treasurer, or other officers, to collect, receive and receipt for the subscription of counties to the stock of said road, and for the taxes levied to pay the same, such collector to give bond to be approved by the county court.

During all the time embraced by these Acts—that is, from 1852, there was a general law in force in Tennessee authorizing the county courts of all the counties through which a railroad is located, or contiguous thereto, to subscribe for stock, provided the proposition be submitted to a vote, and be approved by the people of the county. This general Act was passed January 22, 1852, and the substance of it is incorporated in the Code adopted in 1858, Art. VIII, Chap. 4, secs. 1142, *et seq.*

The clauses of the Constitution of 1834, relied on to establish the invalidity of the Acts of the Legislature under which the bonds in question were issued, are the following, to-wit:

Art. I, called the "*Declaration of Rights*," sec. 8: "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land."

Art. XI, sec. 7: "The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual, or individuals, rights, privileges, immunities, or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law; *Provided always*, the Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good."

On the other hand, in support of the constitutionality of the laws in question, we rely on the proviso to the section last quoted,

giving the Legislature power to grant charters of incorporation, and also on the following sections of the Constitution, to-wit:

Art. II, sec. 29: "The General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation."

Art. XI, sec. 8: "The Legislature shall have the right to vest such powers in the courts of justice, with regard to private and local affairs, as may be deemed expedient."

The county court, it is to be remarked, up to 1835, was a court of pleas and sessions, possessing extensive original jurisdiction, civil and criminal; and under the constitution of 1834 it retained full original jurisdiction in all matters testamentary and of administration, guardianship, partition, dower, and over many other important subjects, and was held in many respects to be a Superior Court.

BRIEF.

The record presents two questions:

First, Whether the bonds sued on were properly admitted in evidence; and this involves the inquiry whether sufficient legal authority for their issuance was shewn, and whether upon their face they imported a legal liability of the county; and

Secondly, Whether, upon the hypothesis of the existence of fraud in their issuance, the charge of the court on the question of estoppel was correct.

I.

In considering these questions, the objections that are taken to the face of the bonds may be first noticed:

1. The suggestion that they purport to be issued by the county court, and not by the county of Tipton, is simply a mistake of fact; and it is therefore unnecessary to inquire what would be the legal consequence if the facts were supposed.

2. Again, it is said, the bonds bear date January 1, 1869, and yet purport to be issued in part by virtue of the act of February 12, 1869; which act was not passed until after the order of the county court directing the bonds to be issued.

These apparent incongruities exist, but they are explained, or are immaterial. Bonds and notes take effect from their delivery,

not from their date; and the want of a date, or a wrong date, or an impossible date, does not affect their validity, if the time of delivery can be proved.

1 Black. Com. (304), (306).
4 Kent Com. (454).
Edward Bills and Notes, 150.
1 Parsons N & B. 41.

It is shown that the subscription of stock was made, and the bonds delivered, on the 21st of July, 1869. The reference on their face to the act of February 12, 1869, demonstrably proves that they were not engraved until after that date.

The order for the subscription of stock, and for the issuance of the bonds, was probably made early in February, before the act of February 12 was passed. That act authorized the subscription to be made payable in six annual instalments, instead of three, and in issuing the bonds advantage was taken by the county of this latter provision to obtain the longer time for payment.

The issuance of thirty years bonds, where the law only authorized six years bonds, was held not to be an objection to their validity in Tennessee.

The State vs. Anderson Co. Ms. [See Appendix to brief of Humes & Poston.]

Here the law authorized six years bonds, and they were so issued and accepted. There is no explanation of the reason why they were dated January 1, 1869, nor is it necessary there should be.

In Railroad Co. vs. Davidson Co. 1 Sneed, 683, where it was objected that the stock was made payable in five instalments when the act contemplated but three, the court says, "this is more favorable to the tax payers, and cannot be an available objection. If it were a departure from the act, it would not lie in the mouth of the party benefited by it to complain, and more particularly when it was fixed by the vote of that party as a term of the contract."

II.

The other objection to the admission of the bonds in evidence asserts their utter invalidity, because of the alleged want of any lawful authority for their issuance.

The precise objections taken in argument below to the validity of the laws under which the bonds were issued, were these: That said Acts suspended general laws for the benefit of a particular individual; that they were laws passed for the benefit of an individual inconsistent with the general laws of the land; and that they granted

to an individual rights, privileges, immunities and exemptions, not by the same law extended to all others who might be able to bring themselves within their provisions; and that they were, therefore, not "*the law of the land*," but were passed in violation of Art. I, sec. 8, and of Art. XI, sec. 7 of the Constitution of 1834.

This view has been sustained by a decision of the Supreme Court of Tennessee, made in September, 1875, in the case of Wallace vs. Tipton county, and the acts in question have been pronounced to be null and void. The case is one of the "*unreported*" decisions of that court, but a copy of the opinion is furnished. The decision was made in a case where a bill in chancery was filed by a tax-payer of the county, against the county and its officers, to enjoin the levy and collection of a tax for the payment of the bonds in question. The bill was dismissed as to the railroad company. None of the bondholders was made a party, and it was simply, in effect a bill by one debtor against his co-debtors to enjoin payment to the common creditor.

The little weight this decision is entitled to, is made manifest by a recent decision of the same court in *Matthews vs. Blount County*, 3 B. J. Lea 120, 124. That was, like *Wallace vs. Tipton County*, a bill by a tax-payer against the county and its officers, to enjoin a tax levied for the payment of bonds issued for stock in a railroad company; and the court absolutely declined to consider questions affecting the validity of the bonds in the hands of the holders, saying they "*can avail nothing in this suit, for the reason that the holders are not before the court.*"

Its merits however will be more fully considered as we proceed.

We undertake to maintain that the acts in question are clearly constitutional and valid, and that this court, under the circumstances, will not follow the decision of the State court holding them to be void.

We assume the following propositions as settled in this court beyond dispute:

1. Questions affecting the validity of commercial securities belong to the domain of general jurisprudence, and are not controlled by the State adjudications. Hence a decision of the State court adverse to the validity of a law under which municipal bonds have been issued, made after their issuance, will not affect their

validity, if this court shall be of opinion that the decision was wrong. And a construction, tending to destroy contracts already made, put by the State courts upon their own statutes will not be followed, but this court will construe the contract and the law according to their own views of their intent and meaning.

Groves vs. Slaughter, 15 Peters, 449.
Rowan vs. Runnels, 5 How. 134.
Planters Bank vs. Sharp, 6 How. 324.
State Bank vs. Knoop, 16 How. 369, 391.
Ohio Life & T. Co. vs. Debolt, 16 How. 432.
Butz vs. Muscatine, 8 Wall. 575.
Olcott vs. Supervisors, 16 Wall. 678.
Pine Grove vs. Talcott, 19 Wall. 666, 677.
Same case, Bench and Bar, Vol. 1, Nos. 3 and 4, page 54, opinion by Judge Emmons.

The result of the authorities on this point is very clearly stated by Judge Dillon in *Foote vs. Johnson County*, 6 Central Law Journal, 345, thus:

"The Supreme Court of the United States considers questions arising upon negotiable municipal bonds issued under State authority, to relate to commercial securities, and not to present questions of mere local law; and where such securities have been issued before any decision of the State tribunals denying the validity of the act authorizing the issue, the Supreme court has declared that in protecting constitutional rights of creditors, it will decide for itself whether, under the constitution and laws of the State, such securities are valid or void." This language is repeated by Judge Dillon in *Westermann vs. Cape Girardeau County*, 7 Central Law Journal, 353.

In Pine Grove vs. Talcott, 19 Wallace, 677, Judge Swayne says, "The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued there had been no authoritative intimation from any quarter that such statutes were invalid."

In Rowan vs. Runnels, 5 How. 134, 139, Chief Justice Taney said, "We ought not to give to them, (State decisions), a retroactive effect, and allow them to render invalid contracts entered into with

citizens of other States, which *in the judgment of this court* were lawfully made."

The language in Rowan vs. Runnels is confined to contracts with citizens of other States, but the principle applies as well to all contracts that come within the jurisdiction of the Federal Courts. (Ohio L. I. & T. Co. vs. Debolt, 16 How. 432; Douglass vs. Pike Co. 10 Reporter 5.) 101 U.S. 677

In Fairfield vs. Gallatin, 100 U. S. 53, it is said by Mr. Justice Strong, that the construction given by this court to the constitution of Mississippi, in Groves vs. Slaughter, was adhered to in Rowan vs. Runnels, "in order to support a contract for slaves purchased, and *apparently only for that reason.*"

2. In cases where the State decisions might otherwise be regarded as conclusive, nevertheless if a contract when made was valid under the constitution and laws of the State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by its Legislature, or *by its judiciary*, can have the effect to make such contract invalid.

Ohio Life and Trust Co. vs. Debolt, 16 How. 431, 2.
Gelpcke vs. Dubuke, 1 Wallace, 175.
Havemeyer vs. Iowa City, 3 Wall. 294.
Thompson vs. Lee County, 3 Id. 330.
Mitchell vs. Burlington, 4 Id. 271.
Lee County vs. Rogers, 7 Id. 181.
The City vs. Lamson, 9 Id. 477.
Olcott vs. Supervisors, 16 Id. 690.
Fairfield vs. Gallatin, 100 U. S. 47.
Douglass vs. Pike Co. 10 Reporter, 1. 101, U.S. 677

In the latter case the principle was held to apply where the question of the constitutionality of the act had been repeatedly before the court upon various objections, and favorably adjudicated, although the particular objection now raised, had not before been presented or considered, the alleged discrepancy between the law and the constitution being just as apparent then as now, and the question being open on the record.

3. In cases of doubtful construction, a contemporaneous practical exposition given by the legislative and executive departments, and acquiesced in for a considerable period, will be adopted and followed by the courts.

Cooley Const. Lim. 67.
Stewart vs. Laird, 1 Cranch, 299, 309.
Martin vs. Hunter, 1 Wheat. 304, 351.
McCulloch vs. Maryland, 4 Wheat. 316, 401.
Cohens vs. Virginia, 6 Wheat. 264, 418.
Briscoe vs. Bank of Ky., 11 Peters, 257, 318.
Prigg vs. State of Pa., 11 Peters, 539, 621.
N. J. Steam Nav. Co. vs. Mer. Bk. 6 How. 344.
West River Bridge vs. Dix, 6 How. 507.
Cooley vs. Wardens of Pa. 12 How. 299, 315.
Gennessee Chief vs. Fitzhugh, 12 How. 443, 458.

III.

Regarding the question as one of general jurisprudence, not affected by the State adjudication, the constitutionality of the original charter and the amendments thereto, is easily established.

1. The legislature of a State, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of improvement, to borrow money to pay for it, and to levy a tax to repay the loan. And this authority can be conferred in such a manner that the objects can be obtained either with or without the sanction of the popular vote.

Thomson vs. Lee County, 3 Wall. 330.
Railroad Co. vs. Otoe County, 16 Wall. 672.

Section 3 of Art. II of the constitution of Tennessee, provides that "the legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives."

This general grant of legislative power is without any limitation, except such as may be found in the constitution itself, or in that of the United States. The power to create corporations is an incident of sovereignty, and is possessed, unless the restriction is contained in the instrument.

Hazen vs. Union Bank, 1 Sneed, 115:
Railroad vs. Davidson County, 1 Sneed, 673.

Section 29 of the same article provides that "the General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner as may be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation."

This provision has a history. After the uninterrupted exercise of the power from 1796 to 1830, the Supreme Court, in the last named year, decided the case of Marr vs. Enloe, 1 Yerger, 452. Two points were ruled in that case, to-wit: *First*, that the legislature could not delegate to the counties, the power of taxation for county purposes, or to meet current expenses; and, *secondly*, that a special tax on the land in ten counties named, for the purpose of improving the streams in those counties, was unconstitutional because a partial law, and unequal in its operation; inasmuch as it imposed a greater tax on the land in those ten counties than on other land in the State.

This decision mainly led to the call of the convention, and to the adoption of the revised constitution of 1834. Nichol vs. Mayor and Aldermen of Nashville, 9 Hum. 266.

The section 29 of Art. II, was adopted for the express purpose of getting rid of the obnoxious decision in Marr vs. Enloe. The evils arising from that decision, and requiring a remedy, were, the denial of the right to delegate the taxing power to counties for county purposes (5 Sneed, 700.); and the denial of the right to lay special taxes on the property in one or more counties, for purposes of local improvement. This section fully meets and corrects these inconveniences.

It is settled in Tennessee, as elsewhere, that the construction of a railroad to or through a county is a "county purpose," within the meaning of this clause; and that this section authorizes the Legislature to pass laws enabling a single county, or a given number of counties, to subscribe to railroads projected to or through them, is a proposition entirely too plain for argument.

Indeed, an Act authorizing all the counties in the State to subscribe for stock in a particular railroad, or in all the railroads in the State, would be largely obnoxious to constitutional objections under this section, for as to a great majority of the counties, no particular enterprise could justly be regarded as a county purpose.

County purposes are infinitely various, dependent upon the peculiar circumstances of the particular county. One needs a bridge over a particular stream, another a plank road, or a turnpike between certain points, while the interests of a third may demand a railroad. To hold that a special Act, authorizing county aid to be extended to these objects by the counties immediately interested, is unconstitutional, is to fly in the face of the Constitution itself, and to deny to the General Assembly the power to authorize the "*several*" counties to do the very thing that is expressly provided for.

The seventh section of Article XI not only is not opposed to the legislation in question, but actually authorizes it.

That section introduced in Tennessee no new principle of Constitutional law, but only embodied the substance of the construction previously put by the Supreme court, in numerous decisions, upon the 8th sec. of Art. I, which was contained literally in the Constitution of 1796. The whole doctrine of the invalidity of partial and special laws, and laws suspending general laws for the benefit of individuals, had been fully recognized and asserted in Tennessee long before 1834, and the unconstitutionality of such legislation had been rested on the proper construction and meaning of the words "*law of the land.*" The law of the State in this respect was precisely the same before this clause was inserted in the Constitution of 1834, that it has been since.

Vanzant vs. Waddell, 2 Yerg. 260.
Walley vs. Kennedy, 2 Yerg. 554.
Bank vs. Cooper, 2 Yerg. 599.
Tate vs. Bell, 4 Yerg. 202.
Officer vs. Young, 5 Yerg. 320.
Fisher's Negroes vs. Dabb, 6 Yerg. 119.
Jones vs. Perry, 10 Yerg. 71, 78.
Budd vs. The State, 3 Hum. 483.
Shepherd vs. Johnson, 2 Hum, 296.
McKinney vs. Hotel Co. 12 Heisk. 109.

It is really only a declaration of the law of the State, as settled by previous decisions; and this is true as to the exception in the proviso in favor of corporations, as well as to the body of that section. For while the courts of the State had pronounced all partial and special legislation to be invalid, as an infraction of our paraphrase of the 29th Chapter of Magna Charta, and therefore not the law of the land, the power to create corporations, public and private, with such franchises as were thought proper, was as universally upheld.

In Hazen vs. Union Bank, 1 Sneed, 115–118, the Court say, "The power to grant corporations is an incident of sovereignty, and belongs to every sovereign State. With us it is exercised by the Legislature, and it may lawfully confer upon the corporators *any rights and privileges it may deem proper and expedient, not inconsistent with the Constitution of the Union or the State.*" The charter of the Union Bank was granted in 1832, and this case was decided in 1853.

In the case of The City of Memphis vs. The Water Company, 5 Heisk., 530, which involved a grant of the exclusive right to the Water Company to supply water to the inhabitants of the city, the court say, in regard to this proviso to the seventh section of Article XI, "In this grant of power to create corporations, there is no limitation on its powers—at least as curtailed by the general terms of the section. The Legislature is required to consult the public good in granting charters." And the exclusive privilege was upheld.

To the same effect is The Railway Company vs. The City, 4 Cold., 414.

All the provisions respecting the county subscriptions to the Mississippi River Railroad Company are contained in the original charter of the company, and in the several Acts which purport on their face to be amendments of the original charter.

A right granted in the charter of a railroad company to receive municipal subscriptions to its stock, is a chartered right and privilege, i. e. a franchise, and on its consolidation with another company, will pass to the consolidated company.

Co. of Scotland vs. Thomas, 94 U. S. 682.
Co. of Henry vs. Nicolay, 95 U. S. 619.
30 Ark. 677.—21 Ill. 451.

Assuming, as we may safely do, that the seventh section of Article XI was intended to embrace all that was embraced by the eighth section of Article I, as the latter had been interpreted by our courts, and that it covered all the ground intended to be covered by the condemnation of special and partial legislation, it is plain that it was not intended to prohibit the passage of special and partial laws in favor of corporations, from these considerations:

First, The previous decisions upon the general questions, and upon the construction of the expression "law of the land," had not included corporations within the category denounced, but on the contrary had asserted the power of the Legislature to create corporations with such peculiar and exclusive powers, privileges and franchises as might be deemed expedient.

See Hazen vs. Union Bank, and other cases cited.

Second, The section in question expressly excludes corporations from its operation. The prohibition only applies to such legis-

lation when in favor of "*particular individuals*"—a phrase that will not embrace corporations without the aid of a context, showing an intention to include them. Even the term "person," so commonly applied to corporations, will be confined to natural persons, unless from the context or other parts of the Act, it appears that corporations were intended.

School Directors vs. Carlisle Bank, 8 Watts, 291;
Blair vs. Worley, 1 Scam. 178.

Corporations are included in the term "inhabitant" or "occupant," if they fall within the general reason and design of the law. And a corporation has been held to be included in the term "individual" in a *tax law*. (8 Gray, 509.)

But here, instead of words indicating an intention to apply the prohibitory clauses of the body of the section to corporations, the *proviso* is inserted expressly to negative such a conclusion, and to show beyond question that the power of the Legislature was not impaired to create corporations, and to endow them with any powers and privileges that may be thought proper, so that the other prohibitions of the Constitution of the state, or of the United States, are not violated.

The plain meaning of the section is, that laws shall not be passed for the benefit of particular individuals, but corporations may be created with such charters, and such franchises, as the Legislature may deem expedient.

Third, The creation of a corporation is necessarily a special and partial law, and a suspension of general laws in favor of individuals. To be a corporation is a franchise, that cannot be enjoyed without a special grant; and every attribute and faculty of a corporation is of necessity a suspension of some general law for the benefit of the corporators. Of course, therefore, the power to create a corporation imports not only the power to pass a special and partial law for the benefit of individuals, but also to suspend all such general laws as would conflict with the particular powers and privileges designed to be conferred upon the new creation.

In this case the original charter of the Mississipppi River Railroad Company bestowed upon it the privilege that its capital stock might be subscribed by "corporations, cities, counties or individuals." The amendment, passed February 25, 1867, authorized the counties through which the road was to run, to make a subscription without referring the proposition to a vote of the people. This was

an *additional privilege conferred upon the company*, not in violation of the Constitution of the State or of the United States, and it was conferred by an amendment of the original charter

So far as the validity of the legislation is concerned there is nothing peculiar in the Constitution of Tennessee. The twenty-ninth chapter of Magna Charta, which is the fountain-head of all this doctrine, is substantially incorporated in the Constitutions of all the American States (Cooley on Const. Lim., 351, note 2). In Tennessee it is found in section eight of Article I. The definition of the phrase "law of the land" has not been matter of dispute or division of opinion. That it means "a general law, embracing all, whether many or few, who are or may come into the like circumstances and situations," as said in Budd vs. The State, 3 Hum., 492, is generally agreed. (Cooley 389, *et seq*). This is substantially the same as the definition given in section seven of Article XI. And there is no reason why the principle should receive a different application in this State, from what is given to it elsewhere.

2. The question of the constitutionality of the acts in question, as a matter of general jurisprudence, is hardly an open one in this court.

The whole subject was passed upon in The Railroad Company vs. Otoe County, 16 Wall, 667. The general law in that case authorized counties to aid railroads, provided the proposition, accompanied by a provision for an extra tax, should be submitted to a vote, and be accepted by a majority of the people.

Otoe County voted in favor of the issue of bonds, *not exceeding* $200,000, for the purpose of procuring an "eastern railroad connection for Nebraska City." $40,000 of these bonds were issued to the Council Bluff & St. Joseph Railroad Company, which *did secure* an eastern railway connection for Nebraska City.

Afterward (February 15, 1869), the Legislature passed an Act authorizing the commissioners of the county to issue $150,000 of bonds, as a donation to the Burlington & Mo. River R. R. Co., or any other railroad company running east from Nebraska City, making no provision for a vote, or a tax; and under this Act, without a vote, the bonds in question were issued.

It is plain that when the $40,000 bonds were issued, and the eastern connection accomplished, the vote authorizing "*not exceeding*" $200,000 bonds to be issued for that special purpose, was exhausted; and the Act of February, 1869, in favor of the other

road, was a new proposition—was a special and partial law—and was in conflict with the general law which required a popular vote. Yet it was held constitutional.

The court say (p. 677): "The Act of 1869 was an unconditional bestowal of authority upon the commissioners, to issue the bonds to the railroad company. It required no precedent action of the voters of the county. That prior to 1869 the sanction of a popular vote had been required, is *quite immaterial.* The requisition was but the Act of an annual Legislature, which any subsequent Legislature could abrogate or annul."

This decision entirely disposes of the doctrine of the invalidity of special, local and partial laws, as applicable to special laws authorizing particular counties to take stock in certain railroads. These are held to be valid.

The Constitution of Tennessee does not antagonize this doctrine, but is in perfect accord with it. Besides the unlimited power to confer franchises upon corporations, the "*several* counties" might be authorized, by the Constitution of 1834, to aid their local improvements *respectively*, without being clogged by a popular vote.

It is to be borne in mind that prior to 1870 there was no constitutional provision in Tennessee requiring county subscriptions in aid of public improvements, to be submitted to a vote of the people, That was a matter of mere legislative discretion, proper enough as a matter of policy, but not at all necessary to be resorted to. Nor does the existence of a statute authorizing county subscriptions to railroads and other improvements, under certain circumstances and conditions, and requiring the proposition to be referred to a popular vote, at all exclude the power to authorize particular subscriptions to be made without such sanction.

An enactment may be the "law of the land," without being a general law. Laws public in their objects, may be general or local in their application. The power that legislates for the State at large, must determine whether particular rules shall extend to the whole State, and to all its citizens, or to a part of the State, or a class of its citizens only. The circumstances of a particular locality, or the prevailing public opinion in that section of the State, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, or a different application of the public moneys. The Legislature may, therefore, prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through dif-

ferent modes, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State Constitution does not forbid. This is done constantly, and the fact that the laws are local in their operation, is not supposed to render them objectionable in principle.

Cooley's Const., 389, 390.

3. Again, if the Acts of Feb. 25 and Nov. 5, 1867, are considered to be Acts granting to individuals rights, privileges, immunities or exemptions, not extended by the same law to other members of the community, they are rights, etc., conferred by a charter of incorporation, and by amendments thereto. Such amendments, when accepted, become a part of the charter, and are to be construed, as to all acts done after their passage, precisely as if contained in the original charter. These Acts authorize the subscription to be made without reference to the people, and in that respect, in a different mode from tha provided in the General Act of January, 1852, and being parts of a charter of incorporation, passed in pursuance of the proviso, they are exceptions out of the prohibitions contained in the body of the section, and are valid.

This view of the case is not met by the opinion in the case of Wallace vs. Tipton County, and is fully sustained by former adjudication of the Supreme Court.

In the case of Hazen vs. Union Bank, 1 Sneed, 116, already quoted, it appears that there was a general law fixing a uniform rate of interest at six per cent. throughout the State. The charter of the Union Bank authorized that bank to take seven per cent., thus suspending and partially repealing a general law for the benefit of that particular corporation.

The argument of the counsel for the plaintiff in error is thus stated in the opinion of the court, to-wit: "That by the general law in force now and at the date of the charter, the legal rate of interest is six per cent. per annum; to take a greater sum is a public offense, punishable in a legal proceeding; that, under the constitution, no one's rights can be taken or affected 'but by the judgment of his peers, or the law of the land'—by which is meant a general public law, equally binding in like circumstances on every member of the community; that the bank has taken a greater rate of interest than others can take under the general law, and that its

charter, permitting it to do so, is a *partial law*, and therefore repugnant to the constitution."

In considering the question, thus fully and fairly presented, the court first observe that the power to grant corporations is an incident of sovereignty, and belongs to every sovereign State; that the Legislature may lawfully confer upon the corporators any rights and privileges it may deem proper and expedient, not inconsistent with the Constitution of the Union or the State; and that a bank is a private corporation, and its charter a contract irrevocable and inviolable by the State, and then proceed to say: "It is not like an ordinary law, prescribing a rule of action, which should be general in its nature, but is a *law in the nature of a contract*, granting a franchise to the corporators, and investing them with a legal estate therein. It must, of necessity, be limited and restricted in its operation to the persons to whom the franchise is intended to be granted, and denied to others; yet it cannot be deemed a *partial law* in the sense of the constitution, and repugnant to its provisions."

The court then show that the Act of 1827, to prohibit the business of banking, operates as a general prohibition against the exercise of this common law right, except where it may be granted as a franchise to natural persons or incorporated companies; but that it has never been considered that the laws containing these exclusive privileges of banking, are repugnant to the constitution as not being "*laws of the land*," of general application.

"A right," it is said, "to take a greater interest than is allowed by the law is a part of the franchise granted to the company, and for its validity must depend upon the same principle as that upon which the corporation itself depends—that is, the inherent power of the State to make the grant. The right to take a greater interest is an exclusive right, denied to others, and so the right to pursue the business of banking is an exclusive right denied to others; and if the one be repugnant to the constitution on the ground that it is not a general law, or 'law of the land,' so must be the other. But we have seen that a law creating a corporation, and granting a franchise is more in the *nature of a contract* than a '*law of the land*' in the sense of the constitution."

All the above reasoning, and more of it in the same direction, is fully applicable to the present case, and seems conclusive.

The charter of the Union Bank was granted in the year 1832, when there was no constitutional provision, but only an Act of the Legislature, requiring the rate of interest to be uniform. Such a

provision was inserted in the constitution of 1834 in these words: "The Legislature shall fix the rate of interest, and the rate so established shall be equal and uniform throughout the State." Art. XI, section 6.

At the close of the opinion in the case last quoted, the court advert to this, and intimate that "no law or grant of franchise can have a legal existence which stands in opposition to it," but being of a date subsequent to the grant of the charter of the Union Bank, it could have no application in that case.

This idea was carried out in the late case of McKinney vs. Overton Hotel Co., 12 Heisk. 104, where the charter, passed after 1834, authorized the Hotel Company to issue its bonds bearing ten per cent. interest. This was held invalid, not because there was a general law fixing the rate of interest at six per cent., but because the constitution expressly provided that the "rate established shall be equal and uniform throughout the State." This latter case has no other significance.

All the views we maintain on this subject are fully sustained by the case of Knoxville and Ohio Railroad Company vs. Hicks, MS. decided in September, 1877, by the Supreme Court of Tennessee.

By an act passed February 25, 1856, the property of the railroad company was exempted from taxation, and the question was whether the law was valid under the constitution of 1834. It was a special and partial law, conferring upon this company a privilege and immunity of the most important character, which was not conferred by the same act upon any other person.

The court after asserting the general proposition that the legislature has the power to bind the State by such contracts for exemption, where that power is not denied by the constitution, to be well established, proceed to inquire whether the constitution of 1834, in force at the time, restricted the power of the legislature in this regard.

It is said by the court to be a familiar fact that the Legislature, under the previous constitution, had exercised the power of granting charters, with total or partial exemptions from taxation, and that the power had never been questioned.

"With these facts prominently before the convention, if it was their purpose to restrict the power of the legislature, we should expect to find the restriction expressed in unequivocal language. But the only hint in respect to the power of the Legislature in respect to

charters of incorporation, is in the *proviso* to sec. 7, Art. II, to the effect that the restriction upon the power of the Legislature to grant special privileges, immunities and exemptions, was not to be construed to affect the power of the Legislature to grant such charters of incorporation as they might deem expedient for the public good, *thereby leaving the power as it previously existed.* If it had been the purpose of the convention to restrict the power of the Legislature in this particular, this would certainly have been the appropriate place to insert the restriction; but, so far from doing so, we find only the proviso above referred to, *which was intended only to exclude the idea that* the first clause of the section against the granting of special privileges, immunities or exemptions was intended to limit the power of the Legislature in regard to granting charters of incorporation."

This case was decided two years after that of Wallace vs. Tipton County, and is wholly inconsistent with it. The questions were substantially the same, and both decisions cannot stand. The later decision must be regarded as the law of the State.

A copy of the opinion is printed in the Appendix to the brief of associate counsel, Messrs. Humes and Poston.

"It is an axiom in American jurisprudence that a statute is not to be pronounced void upon this ground, (conflict with the constitution of the State), unless the repugnancy to the constitution be clear, and the conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment. The particular clause of the constitution must be specified, and the act admit of no reasonable construction in harmony with its meaning."

Pine Grove vs. Talcott, 19 Wall. 673.

"The courts are not at liberty," says Judge Cooley, "to declare an act void because it is, in their opinion, opposed to a spirit supposed to prevade the constitution, but not expressed in words." Cooley's Const. Lim. 171, citing 24 Wend. 220; 20 Wend. 381; 13 Wend. 391, 453, 477; 4 Mich. 244.

"That is a spirit which it is difficult satisfactorily to materialize, even by the most skilful judicial expert," per Judge Cooper, in Luehrman vs. Taxing District, 2 B. J. Lea 438. (64, Tenn.)

4. And lastly, on this point, we insist that the laws in question, under which these bonds were issued, are not *partial laws*, within the meaning of the constitution, but are *general laws.*

These phrases were defined by the Supreme Court of Tennessee in the case of Budd vs. The State, 3 Hum. 483, 491, thus: "The *'law of the land'* is a rule alike embracing and equally affecting all persons in general, or *all persons who exist, or may come, into the like state and circumstances.* A *partial law*, on the contrary, embraces only a portion of those persons who exist in the same state, and are surrounded by like circumstances."

This definition is carried into the constitution of 1834, with very little change of phraseology. A partial law is a law "granting to individuals rights, privileges, immunities or exemptions, other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of the law." Art. XI, sec. 7.

In a recent case in California, it is said: "A general law must include within its sanction, all who come within its purpose and scope. It must be as broad as its object." 11 Cent. L. J. 268.

Now, the original charter of the Mississippi River Railroad Company expressly authorizes "all persons, cities, counties and corporations" to subscribe to its capital stock.

The general law in force at the time imposed no restriction upon any of these classes of persons except the counties, and these were required first to consult the popular will.

Moreover, the constitution only allowed the Legislature to authorize the counties to levy taxes for "county purposes." The construction of a railroad through, or to, a county, or terminating at or near a town, is settled to be a county or corporation purpose in Tennessee. (9 Hum., 252; 1 Sneed, 637, 666; 3 Head., 317.) And so is a road not running through or into a county, if directly connected with a road that does, so as to promote the business or convenience of the people of the county, and extend the facilities of railroad communication.

Van Hostrup vs. Madison City, 1 Wallace, 291;
McCallie vs M. & A. of Chattanooga, 3 Head. 318.

But there must be some element of direct advantage to the commercial and business interests of the county, in order to make the construction of the road a county purpose, and to legitimate a county subscription. Looking to the location of this road, running through five counties only, and these all bordering upon the river, with a railroad passing almost parallel to it, through the counties immediately in their rear, it is evident that these five counties are the only ones in the entire State whose interests, convenience or

business could be in the slightest degree promoted by the construction of this road, or in reference to which it could be considered a county purpose.

We have shewn that "local" legislation of a "public" character is not objectionable. This is emphatically so under our constitution, which authorizes the Legislature "to vest such powers in the courts of justice in regard to private and local affairs" as may be deemed expedient." And we have also shewn that it is the settled law of this court that the Legislature of a State, unless restrained by its organic law, has the right to authorize a municipal corporation to take stock in a railroad, and to borrow money or levy a tax to pay for it; and this without a vote of the people.

Thompson vs. Lee County, 3 Wall., 330.

The Acts in question extend to "*all the counties* through which the line of the Mississippi River Railroad is proposed to run." They therefore embrace all the counties as to which the projected improvement could be a county purpose; and there is no member of the community, able to bring himself within their provisions, to whom the rights conferred are not by the same law extended. The requirements of the constitution are therefore entirely fulfilled.

IV.

But whatever may be the merits of the question on general principles, and as a matter of general jurisprudence, it is easy to shew that previously to the passage of the Acts in question, and to the issuance of the bonds now in suit, the Supreme Court of the State had held similar laws to be perfectly constitutional, and that such was the settled law of the State at the time these bonds were issued. The following cases are referred to in support of this view:

1. Nichol et al, vs. Mayor and Aldermen of Nashville, 9 Hum. 252.

On the 11th of December, 1845, an Act was passed to incorporate a company to construct a railroad from Nashville to Chattanooga, which contained a provision authorizing "any State or any citizen, corporation or company to subscribe for stock."

Under this Act the Mayor and Aldermen of Nashville adopted a resolution to subscribe for stock in said company, but before the subscription was actually made, another Act was passed,—on the 9th of December, 1847,—which referred to the said resolution, and authorized the town to make the subscription through its

Mayor and Aldermen, and to borrow money, pledge taxes, or issue bonds to make the payments. The subscription was thereupon made, and immediately certain residents and property owners in said town filed a bill in chancery to restrain the borrowing of money, or the issuing of bonds to make payments, on the ground of the unconstitutionalty of the law, because not for a corporate purpose, and therefore void under section twenty-nine, Article II of the constitution.

The case was argued by the most distinguished counsel in the State at that day, and the decision was made in 1848.

The court sustained both Acts. In reference to the first the court say: "The Act of 1845 merely authorized the corporation to take stock in the railroad, without giving the power to raise the money for its payment. We think there is nothing unconstitutional in this provision of the statute. If the corporation had money, as it might well have, there can be no good reason why it should not be permitted to vest it in such stocks, etc." p. 264.

Proceeding then to consider the act of 1847, the court say: "But the Act of 1847 goes a step further, and authorizes the corporation to borrow money for that purpose by hypothecating taxes, or to issue bonds for the whole or any part thereof. Now, it is contended that this statute authorizes an appropriation by taxes for this subscription of stock, and that this railroad is not a corporation purpose, and that therefore the Legislature cannot, under the provision of the twenty-ninth section of Article II of our constitution, authorize the corporation of Nashville to levy and collect taxes for the payment of liabilities created by this subscription." p. 265.

After quoting this section at length, and stating that it was incorporated in the constitution in order to remove doubts suggested by the court in the case of Marr vs. Enloe, 1 Yerg. 452, whether the taxing power could be delegated to counties and towns, the court say: "It does nothing more, however, in enlarging the powers of the Legislature than it is believed it possessed before upon this subject, and nothing more in restricting the exercise of the power on the part of counties and incorporated towns, to taxation for county and corporate purposes, than existed before."

Omitting the reasoning of the court, the opinion concludes by saying: "We then hold that the Legislature of Tennessee had the constitutional power to authorize the corporation of Nashville to take stock in the Nashville & Chattanooga Railroad."

It does not expressly appear that the precise point was made or considered, that this was a partial law, and void because it did not embrace all the towns, or all the railroads in the State; but it was a case of a special and partial law, applicable to only a single town, and the whole question of the validity of such legislation was necessarily embraced in the decision.

The constitutionality of these Acts, regarded in the light of a suspension of a general law for the benefit of particular persons, was also involved in the case, and covered by this decision. It is true that there was then no general statute permitting counties and towns to subscribe stock in railroad companies; such a law was not passed until 1852; but the absence of such a statutory permission left the matter as at common law. By that law, corporations possess no powers but those conferred, and no county could make such a subscription without special authority. The *want* of *permission* is *prohibition*, and *prohibition* being the *general rule*, a special permission in favor of particular counties or towns is a suspension of a general law in their favor—as much so as if there had been a general prohibition by statute.

2. The case of Burton vs. The School Commissioners, Meigs Rep., 585, had established the same principle ten years before. The general law prohibited the taking of more than six per cent interest. The Supreme Court held that loans of depreciated paper money, to be repaid in sound funds, was usurious, and within the prohibition of the law relating to interest. (Nashville Bank vs. Hays, 1 Yerg. 243; Grundy vs. Morrison, 1 Yerg. 444.)

The Legislature, after these decisions, passed an Act authorizing the Bank of Tennessee to loan out the depreciated notes of the Nashville Bank at par, to be repaid in sound funds.

Here then was a special law suspending a general law for the benefit of a particular bank, and it was held to be valid and constitutional. The court say: "The Legislature *certainly* had the power to pass this law, and it clearly makes that lawful which otherwise might have been unlawful under the decisions before referred to."

3. The case of Hazen vs. Union Bank, 1 Sneed, 115, is another authority to the same effect, and has been already fully stated in another connection. It holds that under the power to create corporations, a particular bank may be enabled to charge a rate of

interest prohibited to all other persons by the general law; the grant of such a franchise being not in the nature of a law, but rather of a contract, and not objectionable as a "partial law," or not the "law of the land."

It makes no difference that in the last two cases the laws in question were passed before the amendment of the constitution in 1834, for it has already been shown that the seventh section of Article XI of the constitution of 1834, was only declaratory of the meaning of section eight of Article I of the constitution of 1796, as the same had been uniformly interpreted by the courts of the State.

4. The case of The Louisville & Nashville Railroad Company vs. Davidson County *et als.*, 1 Sneed, 638, is fully in point. The report embraces three cases which were submitted and considered together,—one affecting White county, another relating to Sumner county, and the third to Davidson county.

On the 22d of January, 1852, the general law was passed authorizing county courts to subscribe stock in railroads, and regulating the conditions of such subscriptions. Acts of 1851–2, p. 161.

On the 28th of February, 1852, thirty-seven days later, and at the same session, a special Act was passed which, among other things, authorized Davidson and three other counties—Lawrence, Maury and Williamson—to take stock in certain railroads. Acts of 1851–2, p. 275, secs. 12–19.

These Acts were materially different in many important particulars, and were identical in very few, if any. The following are some of the points of difference:

1. The "general" law authorizes the county courts of counties "through which a railway has been, or shall be "located," or which may be contiguous thereto," to subscribe. The "special" Act authorizes subscriptions by the four counties, to stock "of any railroad company "chartered to build" a railroad through said counties, or either or any part of either of them."

2. The "general" law requires the approbation of a "majority of the votes polled;" the "special" Act a majority of the "voters of the county." These expressions were then held to mean the same thing, there being "no other test of the number entitled to vote but the ballot box." 1 Sneed, 692. But the difference would now be regarded as very important, a recent decision of the court, upon the meaning of the words "two-thirds of the qualified voters," having declared that the ballot box is not the final test at all.

Cocke vs. Gooch, 5 Heisk. 294.

3. The "general" law does not authorize bonds to be issued, but requires the subscription to be made payable in annual instalments, not exceeding one-third in any one year, without interest; the "special" law provides for the issuance of bonds having ten to thirty years to run, with six per cent. interest, payable semi-annually.

4. By the "general" law the county court is to levy a tax "to meet the payment;" and by the "special" law, a tax sufficient to "pay the interest," and one per cent., to constitute a sinking fund, to be invested in State bonds.

5. By the "general" law the county court is required to "appoint a collector" of the railroad tax; by the "special" law the tax is to be collected "by the Sheriff or revenue collector."

6. By the "general" law the tax is to be paid over by the collector directly to the railroad company; by the "special" law it is to be paid to the county trustee, who, under directions of the county court, shall pay the interest of the bonds, and invest the sinking fund.

The provisions in the two Acts in relation to the mode of obtaining an order of the county court for an election,—the appointment of the time and places of voting,—the notice to be given—the inscription on the ballots,—the returns of the election,—and the compensation of the collector of the tax, are all different; but these are of minor importance, and need not be particularly stated.

In making their subscriptions the counties of White and Sumner proceeded under the general law; Davidson, under the special law.

The case as to White county involved only the constitutionality of the general law, which was assailed on two grounds. first, that a railroad was not a county purpose within the constitution; and second, that the law was not final and obligatory in itself, but depended for its validity upon the vote of the people.

The Sumner county case involved an additional question. After the subscription of that county had been voted and actually made, payable in five annual instalments, a special Act was passed in December, 1853, authorizing interest-bearing bonds, having ten to twenty years to run, to be issued in payment, thus suspending the general law for the benefit of that county alone. The question came up on a mandamus sued out to compel the delivery of these bonds, which was resisted on the ground that the general Act of 1852, and the "special Act of 1853" were both unconstitutional. See pp. 661, 662.

In considering the questions thus made as to the subscriptions of White and Sumner counties, the court first show that there is no doubt about the authority to delegate the taxing power to civil divisions of the State, or to town corporations, as to local matters generally, and quote Art. XI, sec 8: "The Legislature shall have the right to vest such powers in the courts of justice, with regard to private and local affairs, as may be deemed expedient."

It is then shewn by elaborate argument, that the construction of a railroad to or through a county is a legitimate "county purpose;" and that the law is not unconstitutional by reason of the requirement that the proposed subscription shall be referred to a vote of the people.

Having disposed of those questions, the court then use this language: "The clause against partial and private laws is also cited. Const. Art. XI, sec. 7. This is, if possible, still more remote and inapplicable. To prove this, it will only be necessary to read it in connection with section 29 of Article II. But these objections are but little relied upon, and need not be further noticed." p. ~~798~~. 679

Now the only partial and private law referred to in the case, and to which this language, just quoted, could have any possible application, was the special Act of December, 1853, authorizing Sumner county to issue bonds for her subscription, instead of paying by taxation in annual instalments. This was a partial and private law, and it was held to be fully sustained and authorized by the 29th section of Article II, giving power to authorize the "several" counties to impose taxes for county purposes.

And proceeding further, the court, with express reference to "*the changes made by the amendatory Act of 1853*," say, Whose rights are affected? WHAT RULE OF LAW FORBIDS IT?" pp. 685, 686.

The court then consider the case as to the county of Davidson, and say: "The Davidson county case presents some different questions. The Act under which it proceeded was different from the other in a few particulars. It was passed at the same session, (Act of 1852, ch. 191, secs. 12 to 20), and only applied to a few counties, including Davidson. We will only notice a few of the points made in this case, and none which are the same in both cases." p. 691.

Attention is thus directed to the fact that the law under which Davidson county proceeded was a partial and special law, applicable to only a few counties, and that it differed from the general law, which had been passed five weeks before; but nothing further is said

on the particular point now in question. The court evidently consider the point settled by what has been said concerning the partial and private law for Sumner county, and they affirm the judgment of the court below ordering a mandamus to compel the levy of a tax to pay the interest on the bonds. This decision necessarily embraced an affirmance of the constitutionality of the special act of February 28, 1852, under which the subscription of Davidson county had been made. See Williamson vs. Suydam, 6 Wallace, 737, 738.

5. *McCallie vs. Mayor and Aldermen of Chattanooga*, 3 Head. 317, decided in 1859, is also in point.

The charter of the town, which was granted in 1851, provides that "the said corporation shall have power to subscribe for stock in any railroad or turnpike road company, and pay for the same with its bonds or otherwise."

The constitution of 1834 was then in force, and the provisions of the Act of January 22, 1852, passed a year afterward, were, by the thirteenth section, expressly made applicable to "the incorporated cities and towns within the state." The railroad company was not incorporated until 1854, and in that year the town of Chattanooga subscribed for stock, and subsequently assessed a tax to pay the subscription. McCallie resisted the tax mainly on two grounds—first, that his property, for special reasons, was exempt; and second, that the railroad was not a "corporation purpose" within section twenty-nine, Article II, of the constitution. Both these points were ruled against him.

But the opinion shows that another ground was also relied on, to wit: that the proposition had not been submitted to a vote of the people, as required by the general law of 1852. The court say: "The objection that the proposition to subscribe for the stock was not submitted to a vote of the inhabitants of the town, is not well founded. The legislature was authorized by the constitution to confer the power, directly and exclusively, upon the mayor and aldermen. Constitution, Article II, section 29."

This case clearly decides that under section 29, Article II, of the constitution it was competent for the legislature to authorize a *particular municipal corporation* to subscribe for stock in a railroad, notwithstanding the fact that by the *general law* of the State no

municipal corporation possessed that right without an express grant, and that such subscription may be made without a reference of the proposition to the people. And it is further decided by necessary implication, that the passage of the general law of January 22, 1852; by which such propositions were required to be submitted to a popular vote, did not take away or interfere with the power previously conferred on a mere municipal corporation, which was entirely subject to the will of the legislature, to make such subscription without the sanction of popular approbation.

The submission to the people was not a "vital thing" previous to the constitution of 1870. Under the constitution of 1796, the question was whether the particular act was the "law of the land," that is, whether it was a general law, embracing all, whether many or few, who were or might come into the like circumstances and situations. (3 Hum. 492). Under the constitution of 1834, it was a question whether the act of the legislature was in harmony with Article II, section 29, and Article XI, sections 7 and 8. There was no provision on the subject of a popular vote in either of these constitutions.

In the absence of legislation the general law is that no municipal corporation can subscribe for stock in railroads, and therefore, a law authorizing certain counties to do so, would be a partial law, suspending a general law as to those counties.

So, if there be a general statute law authorizing all the counties to take such stock upon certain conditions and in a certain manner, a law dispensing with such conditions in whole or in part, or varying the terms and manner of the subscription, and authorizing certain counties to take stock in other roads, or in a different manner, or upon different terms, would be a partial law, suspending a general law for the benefit of particular persons.

In this respect it would make no difference what part of the general law is repealed or suspended, whether it is the part requiring a popular vote, or the part regulating the terms and conditions of the subscription. All the provisions of the general law are of equal importance so far as regards the power of the legislature to suspend or repeal them in favor of particular railroads, or particular municipalities. The power to suspend any general law, whether a wise or unwise one, whether material or immaterial, is equally denied, and a small infraction of the constitution is forbidden as much as a large one.

It is, therefore, no answer to our position to say that the particulars in which the special law for Davidson and other counties differed from the general law, were non-essential. That is a gratuitous assumption. On the contrary, no conceivable motive existed for the passage of the special law of February 28, 1852, unless it was for the purpose of getting rid of some of the restrictions contained in the general law. The popular vote was not dispensed with, but the necessity of a previous *location* of the road was abolished, and power was given these counties to issue bonds for their subscription, running from ten to thirty years, with interest, instead of paying the subscription in instalments, not exceeding one-third of the whole amount annually, without interest.

These were material and substantial provisions, as also were other distinctive features of the special act. In order to secure these special privileges to Davidson, and other counties, it was thought necessary to have a special law passed to confer them, and this was done by the same legislature that had five weeks before enacted the general law.

This particular law, passed for this particular purpose, and applying to only four counties, was nevertheless held to be valid and constitutional.

All the foregoing cases were decided long before the Acts of February and November, 1867, amendatory of the charter of the Mississippi River Railroad Company, were passed, and they constituted the law of Tennessee at that time. It was upon the faith of the law thus announced that these acts were passed, and the bonds in question issued and put in circulation. The most prudent and cautious of men had the right to rely on the validity of obligations issued under such sanctions.

It is objected to the force of some of these decisions, that they are instances of subscriptions made by incorporated towns, and not by counties. This is true only of the cases in 9 Hum. and 3 Head. and not of the case from 1 Sneed.

We deny that there is any difference in this respect between cities and towns. Both are placed on the same footing by section 29 of Article II, of the constitution of 1834, and one is as much capable of being authorized to subscribe for stock as the other.

Besides, the Legislature has power to create counties; and sec.

402 of the code of 1858 declares, "*Every county is a corporation*, and the justices in the county court assembled, are the representatives of the county, and authorized to act for it."

They are not declared to be "*quasi* corporations," but "corporations" in the full sense of that term. They are political divisions of the State, it is true, but they are "corporations," also; and no reason is perceived why they may not be invested with all powers and franchises that may be conferred on incorporated towns, or indeed, on any other corporation.

It is not necessary for us to show that the cases cited were elaborately argued, or maturely considered, or correctly decided, though they bear intrinsic evidence of all these conditions. It is enough that in 1869, no one would have been bold enough to affirm that they did not embody the law of the State, and no one could have been found with sufficient foresight to predict the sudden and total departure from them.

In the language of the learned Chief Justice in Douglass vs. Pike county, "No lawyer asked for a professional opinion on that subject could have hesitated to say that it had been settled." This was said in a case where, as already mentioned, the precise objection raised had not before been urged or considered. The repeated affirmance of the constitutionality of the law, without any special reference to this objection, was nevertheless held sufficient to settle the question; the alleged discrepancy between the constitution and the law being apparent then as now.

Indeed it was but a very short time before the decision of Wallace vs. Tipton county, that every principle involved in the cases above cited, had been deliberately adopted and ratified, with entire unanimity, by the same court, composed of the very same Judges. In *The State, on the relation of Ross vs. Anderson County*, MS. the subscription of Anderson county to a railroad was initiated and a vote taken in 1853, under the general law of January 22, 1852, but in an irregular and illegal manner.

No further proceedings were had until after February 18, 1854, at which date a special Act was passed extending to Anderson, and a few other counties, the same authority and power to take stock and issue bonds, as had been granted to Davidson and other counties by the Act of February 28, 1852; and also declaring the acts of any of said counties in voting stock, etc., to be as valid and binding as though said acts had been strictly in accordance with law.

The subscription was completed and the bonds were issued under this latter Act; and the validity of *this special Act*, by which the provisions of a *former special Act* were extended to Anderson county, was assumed by the court, without question, and a mandamus ordered to compel the levy of a tax to pay the interest of the bonds thus issued.

This case is valuable in several respects. Among other things, the court held that, as the county had received the stock and paid the interest on the bonds for some years, the acts of the agents of the people in issuing the bonds had been ratified; and further, that as against a bona fide holder, the county could not show fraud in its own agents in issuing the bonds—citing 21 How. 359; 13 Wall. 298, and 15 Wall. 356.

The court also held expressly that the provision of the special act for the benefit of Anderson county, ratifying the popular vote, and curing the irregularities therein, was valid and effectual, citing with approval the case of St. Joseph vs. Rogers, 16 Wallace, 666.

It is no matter that it was an act to cure irregularities. It was in this respect a special and partial law, for the benefit of one county, and its effect was to authorize Anderson county to vote in a different manner from the other counties in the State. If the Legislature could ratify an irregular vote after it was taken, then it could have authorized that mode of voting beforehand. And if it could authorize one county to vote in a different way from the other counties, then this whole theory of the invalidity of partial law falls to the ground, so far as relates to cases arising in Tennessee, under section 29, Article II of the constitution.

It is plain that the Legislature could not ratify the irregular vote unless it possessed the power to authorize beforehand the vote to be taken in that particular way. The rule is tersely stated by Judge Clifford in St. Joseph vs. Rogers, 16 Wallace 663, thus: "Defective subscriptions of the kind may in all cases be ratified, where the Legislature could have originally conferred the power." And the principle is expressly recognized by the court in the opinion in Wallace vs. Tipton County.

The act of ratification is as much a partial law, and not the law of the land, as an act passed beforehand to authorize the thing to be done. Such an act, whether to authorize beforehand, or to ratify afterward, is necessarily a partial law, and a law suspending a general law for the benefit of a particular county or corporation. We deny that such legislation, in respect to county subscriptions to rail-

roads, is invalid at all, and such was the decision in Ross vs. Anderson county.

But this case reaches still further. A mandamus was awarded by the court, commanding Anderson county to levy a tax to pay her bonds. This, by necessary implication, affirmed the validity of the *special act* of February 18, 1854, whereby the provisions of the *special act* of February 28, 1852, in relation to Davidson and other counties, were extended and made applicable to Anderson county, thus by a sort of "double procession," holding special and partial legislation of this sort valid even to the second degree.

Precisely the same line of adjudication has been pursued by the same court (four of the five Judges being the same that decided Wallace vs. Tipton county), in the recent case of Clay vs. Hawkins county, decided in September, 1880. A copy of the opinion will be found in the Appendix to this brief.

It has already been shown that by sections 12 to 19 both inclusive, of an act entitled "An act to incorporate the Nashville, Franklin and Columbia Railroad Company," passed February 28, 1852, being Chapter 191, page 273, of the acts of that session, the counties of Lawrence, Maury, Williamson and Davidson, were authorized to subscribe for stock in any railroad company *chartered to build a railroad* through said counties, and to issue bonds for the same, bearing interest, and having from ten to thirty years to run to maturity.

The 20th section of the same act provides, "that so many of the sections of this act as relate to the counties of Lawrence, Maury, Williamson and Davidson, and authorize those counties to take stock in railroads, and to issue the bonds of said counties for the same, shall also apply to the following counties: Jefferson, Greene, *Hawkins*," and several others.

Under this act, Hawkins county made a subscription for stock in the year 1856, but did not issue the bonds in question until the year 1866. In the meantime, the act of January 22, 1852, was revised and incorporated in the Code of 1858, which also contained certain repealing sections.

Clay and others, tax-payers of the county, filed their bill to have these bonds declared void, and their payment enjoined. The decision proceeds on the assumption that the special act of February 28, 1852, constituted the only authority for issuing the bonds,

and that if that act had been repealed before their issuance, the bonds were void. The same would of course be the case if the act was unconstitutional and void from the beginning.

The question in the case was, whether the power to issue bonds, conferred by the act of February 28, was repealed or taken away by the Code of 1858, which contained a substantial re-enactment of the general act of January 22, 1852. That act had not conferred the power to issue bonds, but had provided for the payment of the subscription by taxation, in regular annual instalments, not exceeding one-third in any one year, and this feature was continued in the Code.

The question then being whether the special act of February 28, was in force in Hawkins county in 1866, when the bonds were issued, the inquiry as to the constitutional validity of the law was necessarily involved, as well as the question of its repeal.

The court expressly mention both acts, to-wit, the general act of January 22, 1852, and the special act of February 28, 1852, and in reference to them, say: "Both acts being in force, and the latter expressly authorizing the issuance of bonds in payment of the subscriptions, and the power having been exercised, and acquiesced in by the county for several years, we hold that the bonds are not void." This, by necessary implication, affirms the constitutionality of the act, so far as it authorizes certain counties to issue bonds for their subscriptions, having ten to thirty years to run, with interest annually, and to create a sinking fund for their redemption at maturity,—a privilege denied to all the other counties in the State, which are required to pay their subscriptions in annual instalments.

It may be said that the question of constitutionality was not expressly raised or expressly decided. That is true. But the case shows that the decision in Wallace vs. Tipton county is not respected by the Bar or the Bench in Tennessee; and that the constitutionality of special laws authorizing particular counties to subscribe for stock in certain railroads, and defining the special conditions and terms of the subscription, at variance with the existing general laws, was not considered, by the counsel or by the court, as the subject of controversy.

We conceive that no distinction in principle can possibly be drawn between the special laws relating to the Mississippi River Railroad Company, and the special laws relating to Davidson, Anderson, and Hawkins counties. The first suspended the general law in

regard to the necessity of submitting the question of subscription to a vote of the people. The second suspended the general law in regard to the necessity of a previous "*location*" of the road, and in regard to the mode and time of securing and paying the subscription. If the first are partial laws because not extending to all the counties and all the railroads in the State, the others are necessarily partial laws for the same reason. If one class is invalid, the other must be invalid also. If one is valid, the other must be equally so.

V.

The contemporaneous practical exposition of the constitution by the *legislative* and *executive* departments, acquiesced in for a considerable period, certainly is favorable to the validity of these laws.

The Appendix to the brief of associate counsel refers to numerous instances of laws passed by the legislature, and approved by the Executive, between 1834 and 1870, precisely similar in character and principle to the laws in question in this case. How many of these were actually executed, does not appear, but certainly a very great proportion of them. That however is immaterial. The question is as to the understanding and practice of these two co-ordinate departments of the Government.

The labor of this compilation was undertaken on the special request of the learned and lamented Circuit Judge, who presided on the trial below. His sense of its importance is evidenced by the remarks made by him in the close of his opinion overruling the motion for a new trial. (Record, 54).

After thanking counsel for the fulness of their work, he proceeds to say: "We deem this of primary importance, as the question here is quite as much what had been the practical construction of the constitution,—what had the citizen a right from public action to believe it meant,—as what may be its possible interpretation upon a now critical and novel reading."

The leading authorities on this point are quoted on a previous page of this brief.

In a very recent case in Illinois, upon this point, where the Legislature had passed, and the Governor approved a large number of like charters, and where there had been various suits at law in which the question of constitutionality had not been raised, the court say: "This is a contemporaneous and practical construction of the constitution of 1848, in this respect, which is entitled to great weight. Great regard ought, in construing a statute, to be paid to the con-

struction which the sages of the law, who lived about the time, or soon after it was made, put upon it, because they were best able to judge of the intention of the makers. It is, moreover, a maxim that "*contemporanea expositio est fortissima in lege.*" (Referring to 4 Bac. Ab. Stat. 648: 6 Wheat. 264; 55 N. Y. 377; 1 Gilm. 680, 681; Cooley Const. Lim. 67; 22 Cal. 71; 2 Mass. 477; 1 Cranch. 299).

People vs. Loewenthal, 10 Reporter 395.

On this subject the Supreme Court of Tennessee, (composed of the same five judges who decided the case of Wallace vs. Tipton county), in the MS. case, already referred to, of Knoxville and Ohio Railroad Company vs. Hicks, in 1877, used the following language: "Where there has been no judicial construction of a clause of the constitution, the courts have given great weight to the construction given to the clause by other departments of the Government, (citing the cases in 1 Cranch, and 1, 6, and 12 Wheaton). Several successive legislatures that met while this constitution was in force, a period of thirty-six years, granted charters of incorporation, with total, or partial exemptions for a time, and during the entire period the power was never questioned. On the contrary all departments of the Government acquiesced and obeyed the laws thus passed, and under these nearly all our public improvements have been constructed. This uniform action upon the part of the State authorities is entitled to great weight."

It is impossible to regard the opinion of the Supreme Court of Tennessee in Wallace vs. Tipton county as satisfactory or decisive. Two opinions were delivered, one on the hearing of the case, and the other on the application to permit a reargument. Neither of them discusses or expresses any opinion on the points relied on by us in this case. No consideration is bestowed upon the long and uniform practical interpretation of the constitution by the co-ordinate departments of the State Government. Not a word is said as to the effect of the proviso to section 7 of Article XI, giving power to the Legislature to "grant such charters of incorporation as they may deem expedient for the public good." Stress is laid upon section 8 of Article I, and upon the effect that had been given in Tennessee to the phrase "law of the land," and yet the court wholly overlook the fact that under the general legislative power to create

corporations, which was not expressly granted by the constitution of 1796, it had long been settled, notwithstanding that section of the Bill of Rights, that special privileges might be granted to, and general laws suspended for the benefit of, corporations, even to the extent of allowing a single corporation to charge a greater rate of interest than that fixed by the general law on the subject. (Hazen vs. Union Bank, 1 Sneed 115, 118; Railway Company vs. The City, 4 Cold 414; Memphis vs Water Company, 5 Heisk. 530.)

Section 29 of Article II, is quoted indeed, but not a word is said in regard to its application to, or its effect upon the matter under discussion.

The Davidson county case in 1 Sneed is referred to, but only upon the proposition that a subscription to a railroad is a county purpose, and that the question of subscription may constitutionally be left to a vote of the people. Those parts of the decision which affirm the constitutionality of the special law for Sumner county, and assume the constitutionality of the special law for Davidson county, are not even adverted to.

All the reasoning in this part of the opinion is concentrated in a single sentence, to-wit: "In view of what has been already said of the act of 1851–2 as a law of the land, it is scarcely necessary to do more than to read the acts of February 25th, and November 5th, 1867, to be satisfied of their unconstitutionality."

The opinion delivered on dismissing the application for a rehearing does nothing more, so far as these questions are concerned, than briefly to notice two cases cited by the defendants, and more fully a single case relied on by the other side.

It seems to be admitted by the court that in the case of McCallie vs. Chattanooga, 3 Head 322, it was held "that Article II, section 29, conferred the power on the Legislature to authorize the Mayor and Aldermen to subscribe for stock *without a vote of the inhabitants.*" But that case is disposed of by the single remark that "the question is not discussed at all, a simple declaration of the power conferred by the constitution, without any reference to a discussion of the effect of the act of 1851–2 as an exercise of that power." It is perhaps enough for us that it is an adjudication of the precise point in controversy here, whether it is to be regarded as now overruled or not. The only criticism made upon it is in the suggestion that the act of 1851–2 may perhaps be considered an exercise of the power conferred by the charter on the Mayor and

Aldermen of Chattanooga. But it clearly was not an exercise of that power. At most the general law may have conferred on the city an additional and cumulative power to do the same thing. The decision certainly settles the proposition that the general law did not repeal the power conferred by the charter.

Ross vs. Anderson County is another case referred to. In regard to it the court say, "it is held where the power exists and has been exercised, a mere irregularity in its exercise may be cured by legislative enactment, or may be insufficient to render the acts void."

We have in this brief already sufficiently remarked upon this case, and we think have shewn that it imports a great deal more than is credited to it in the above extract. We have shewn that the power to ratify depends upon the power originally to authorize the act to be done—and that if an act to authorize one county to vote in a different manner from that prescribed by a general law for all the counties, is a partial law, not the law of the land, and void, then an act to ratify such a vote after it has been illegally taken, must be equally void, for the same reasons. And we have also shewn that this decision necessarily affirms the constitutionality of the special legislation for Anderson county.

The learned Judge then invokes the case of McKinney vs. Overton Hotel Company, 12 Heiskill 104, as a conclusive authority in support of the original opinion. And here we submit that the principle on which that case was decided is overlooked. It was not put on the mere ground that an act giving authority to a corporation to issue bonds bearing a greater rate of interest than that fixed by the general law on the subject of interest, was void as a partial law. That proposition had long been settled the other way in Hazen vs. The Union Bank, and Burton vs. School Commissioners. The doctrine of those cases is conceded in the Overton Hotel case, and the decision is expressly based upon the 6th section of Article XI of the Constitution of 1834, which provides: "The Legislature shall fix the rate of interest, and the rate so established shall be equal and uniform throughout the State." This clause is held to introduce a new rule, inconsistent with the old one, and to restrict, in respect to the rate of interest, the power of the Legislature in granting franchises and privileges to corporations. It is admitted that before this clause was inserted in the constitution, such powers might have been conferred on corporations, but it is said that now, by this clause, "it was enacted that no more special

privileges should be granted to these corporations to take a higher rate of interest than to other individuals, but that only one rate should be allowed to all throughout the State." (12 Heisk 126). It is distinctly on this ground that the case was decided, and it is therefore no authority for the decision in Wallace vs. Tipton county.

The opinions in the case will be found in the Appendix of Messrs. Humes & Poston.

We submit therefore that the court will not follow the decision of the State court in Wallace vs. Tipton county. If the question is one belonging to the domain of general jurisprudence, the decision is not binding, and is clearly wrong. And if it is binding, it is so prospectively only, and the court will not permit it to have a retrospective operation to destroy obligations that were valid when they were entered into.

VI.

It only remains to consider whether any error was committed by the Circuit Judge in his charge to the jury.

It will be observed that all the charges asked by the defendant's counsel were given, but all of them were qualified and controlled by the single charge given on request of the plaintiff.

That charge surely enunciated a sound legal principle. The proposition is summarized in the qualification annexed to the fifth charge given for the defendant, thus, "If one citizen about to buy a demand against another, applies to him in good faith to ascertain whether the demand will be paid, and is informed that it will be, and buys in reliance upon such information, the party admitting his obligation will not be permitted to defend, although the admission was made in ignorance of a valid defence." (Record, 44).

If authority be necessary for so plain a proposition, it is abundant.

Herm. on Estoppel, p. 446, sec. 450.
Herm. on Estoppel, p. 334, sec. 320.
Edwards on Bills & N. (353).
Hamer vs. Johnson, 5 How. Miss. 698.
Benedict vs. Caffe, 5 Duer. 226.
Welland Canal vs. Hathaway, 8 Wend. 483.
2 Smith Lead. cas. 7 Ed. pp. 720, 721, 736.

The theory of the charge, and well sustained by the proof, is that the project was started of a consolidation of the Paducah and Gulf Railroad Company with the Mississippi River Railroad Company. The former company owned a railroad 63 miles long, from Paducah to Troy, completed, equipped, in operation, and out of debt. The latter owned nothing but a right of way, on which some work had been done, but no completed road, and was the holder of the bonds of Tipton and other counties. Tipton county had not paid its bonds as they fell due, and the Paducah and Gulf Company would not agree to the consolidation without some assurance that they would be promptly paid to the consolidated company. In this condition, the Mississippi River Railroad Company authorized Mr. Norton, the President and chief stockholder of the Paducah and Gulf Company, to submit to Tipton county a proposition to extend the time of payment of the bonds to ten years, in equal annual instalments, on condition that the county would immediately levy and collect a tax for the first instalment, and would pay the other instalments as they fell due. Armed with this proposition in writing, Mr. Norton went before the county court, and explained the negotiation pending for a consolidation, and that it would not take place if there was any question as to the bonds of the county, or if the county would not accept and comply with the said proposition of the Mississippi River Railroad Company; that he owned the majority of the stock, and would oppose the consolidation, and that his opposition would defeat it. Upon this representation, and to secure the consolidation of the companies, and the consequent completion of the road to Memphis, the county court accepted the said proposition, and levied a tax to pay the first instalment. (Rec. ord, 23, 24).

In consequence of this arrangement, and acting on the faith of it, the consolidation was effected, Norton supporting it, and Tipton county voting her $200,000 of stock in favor of it. The consolidated company proceeded to expend half a million of dollars in the construction of the road in Tipton county, and it was not until after the road had been completed from the county seat to Memphis, thirty-seven miles, that the county began to refuse to carry out the agreement. In the mean time taxes to the amount of over $38,000 had been collected, and paid on account of the bonds.

The above facts were substantially recapitulated in the charge, and the jury were told that if they found them sustained by the evidence, then the charges of corruption and fraud in procuring the issuance of the bonds, would constitute no defense to the action.

It would be hard to conceive of a stronger case for the application of the doctrine of estoppel.

No objection was made to the admission of the parol evidence of Mr. Norton, nor was any instruction asked by defendant's counsel as to its effect.

Parol evidence is always admissable to apply an instrument to its subject matter, to show the consideration, and to throw upon it the light of the surrounding circumstances.

The Justices, in County Court assembled, are the representatives of the county, and author zed to act for it.

Code of Tenn. sec. 402.

There is no rule of law requiring that the negotiation for the consolidation should be explained to the county court in writing. The written proposition of the Mississippi River Company was only incidental to the main object of Mr. Norton, which was to secure the consolidation. The acceptance of the written proposition, and the levy of the tax to pay the first instalment, all which was done by a recorded vote, constituted the evidence of the assurance that the bonds would be paid.

The minutes of the proceedings of a corporate body are not the only evidence of its acts. It may contract by vote, whether recorded or not, and may make parol promises, and may be bound by implied contracts like natural persons.

Ang & Ames Corp. Chap. VIII.

It is not necessary to the application of the doctrine of estoppel, that the representations made should be knowingly untrue, or that there should be any intention to deceive or mislead. It is enough if the party means his representation to be acted upon, and it is acted upon accordingly.

Herman on Estoppel, p. 442, 3, 4. sec. 444, 5, 6 and 7.

Nor, in the case of corporations, is it necessary that the corporate power should exist to give the assurance, or to make the contract in question.

It is the well settled modern doctrine, that in all cases of executed contracts, a corporation having made the contract and received the consideration, is estopped from setting up the defence of *ultra vires*, when sued on the contract.

Field on Corp. secs. 258 to 273.
Green's Brice's Ultra Vires, 372 and note.
Sedgw. Stat. and Const. law, 90.
Herman on Estoppel, sec. 542.

Pine Grove vs. Talcott, 19 Wall. 678.
Arms Co. vs. Barlow, 63 N. Y. 70.
Railway Co. vs. McCarthy, 96 U. S. 267.
San Antonio vs. Mehaffy, 96 U. S. 315.
Hitchcock vs. Galveston, 96 U. S. 351.
National Bank vs. Matthew, 98 U. S. 629.
Bissell vs. Railroad Co. 22 N. Y. 258.
De Graff vs. Thread Co. 24 Barb. 375.
Gas Co. vs. San Francisco, 9 Cal. 453.
Pennington vs. Taniere, 64 Eng. Com. L. 1012.
Zabriskie vs. Railroad, 23 How. 397–401.
Bissell vs. Jeffersonville, 24 How. 299, 300.
Railroad vs. Howard, 7 Wall. 413.
Bradley vs. Bullard, 55 Ill. 417.
Adams vs. Memphis, etc. 2 Cold. 661.

In view of this principle, the circuit judge ought to have carried the doctrine of estoppel much further than he did in his charge, for not only did the consolidated company, in reliance on the engagement of the county, expend half a million of dollars within the county, and construct, equip and operate a railroad from the county seat to the most convenient commercial centre, which was of incalculable benefit to the county, and which it retains and enjoys, but the county also received, in consideration of its subscription, two hundred thousand dollars of preferred stock in the Mississippi River Company, which it voted as a stockholder in all the corporate meetings of that company, and notably on the quesion of the consolidation, ahd which it exchanged for stock in the consolidated company, and thereby became, and still is, a stockholder in the last named company.

In the light of these facts, the learned judge ought to have instructed the jury that the county was estopped from disputing the validity of the bonds issued in payment for the stock, without any reference to what occurred in the county court on the 2d of October, 1871, when the proceeding in reference to the consolidation took place.

No person can adopt that part of a contract making in his own favor, and reject the residue, to the injury of third persons.

1 Smith Lead. cas. 129–141, Smith vs. Hodson.

The plaintiffs were entitled to have the first three instructions asked by them given to the jury. (Record 42, 43).

These instructions recite the facts as proved in evidence, and assert that if they are believed to be true by the jury, then the plaintiffs are bona fide holders of the bonds, for value, in due course of trade. The bonds held by the Rogers Locomotive Works were, on their face, payable Jan, 1, 1873. They were pledged to the Southern Railroad Association, in January, 1871, as collateral for a loan of money, and the note of the Mississippi River Railroad Company, with the collaterals, was passed by the Southern Railroad Association to Drexel, Morgan & Co. These bonds never came back to the Mississippi River Company, but have passed under the original pledge, by successive assignments, to the present holders. The note of the Paducah and Gulf Company was substituted for that of the Mississippi River Company, at its maturity, Drexel, Morgan & Co. retaining the collaterals. In March, 1872, Norton, Slaughter & Co., by request of the consolidated company, advanced the money to Drexel, Morgan & Co., to to take up the note of the Paducah and Gulf Company, and became the holders of the collaterals, to indemnify them for their advances. So far, there can be no possible question.

But in March, 1873, the consolidated company—the Paducah and Memphis Railroad Company—took up these bonds from Norton, Slaughter & Co., by placing in their stead the first mortgage bonds of said consolidated company.

Now, the principle that a purchaser with notice from a purchaser without notice will be protected, applies to negotiable instruments.

1 Pars. N. & B. 261, cases cited.
Edwards, B. & N. 294, (312).
1 Danl. Neg. Inst. secs. 704, 726.

And a transferee for value, after dishonor, acquires against all previous parties all the rights which his transferrer held against them.

1 Pars. N. & B. 262.

It would impair the right, and deteriorate the property of every bona fide holder, if the law were otherwise.

The Paducah and Memphis Railroad Company gave value for these bonds. They substituted their own obligations in place of them, and thus became the holders, with all the rights which Norton, Slaughter & Co. had against the obligors.

The Paducah and Memphis Company was not identical with the Mississippi River Company, and the bonds when thus acquired by the former company did not become the property of the latter. The Paducah and Memphis Railroad Company was a different and distinct corporation, in which the Mississippi River Company was only one of the constituent elements, and the former could become the bona fide holder of the bonds. Being thus the holder, the transfer by them to the Rogers Locomotive Works, passed to that company all the rights which the Paducah and Memphis Railroad Company possessed, to-wit: all the rights which Norton, Slaughter & Co. had against Tipton county.

It may be said that this court cannot, on this writ of error, look to errors committed to the prejudice of the defendants in error. To a certain extent that is true. But if the court can clearly see that the merits of the case are with the defendants in error, and that another trial, under proper instructions, would be bound to result in he same way, we respectfully submit that the court will not reverse the judgment on account of a technical error that may have been committed to the prejudice of the plaintiffs in error.

Sturges vs. Clough, 1 Wall. 269.
Cooper vs. Coates, 21 Wall. 105.

ESTES & ELLETT,
Counsel for Defendants in Error.

APPENDIX.

H. B. CLAY, and others,

vs.

THE JUSTICES OF HAWKINS COUNTY, and others.

OPINION.

This bill is filed by H. B. Clay and other citizens and tax-payers of Hawkins county, against the Justices of the Peace and holders of certain bonds of the county, issued to the Rogersville and Jefferson Railroad Company. The object of the bill is—1st, to have the bonds in question declared void, and the further payment of the interest thereon enjoined. The Rogersville and Jefferson Railroad Company was chartered by the Legislature of 1851–2. The county of Hawkins subscribed for stock in the amount of $50,000, and the bill expressly concedes that the subscription was in accordance with the power given by the act of 1851–2 then in full force, and in pursuance of the vote of the people upon the question; and further, *that the subscription was valid.* The date of the subscription is not precisely given, but it is to be inferred from the statements of the bill that it was in the year 1856. The bonds in question were issued in the year 1866 in payment of a balance of this subscription to the amount of $40,000. The ground assumed in the bill is that although the subscription was valid, there was, *at the time the bonds were issued in 1866*, no legislative act *in force* authorizing the county court to issue the bonds in payment of the stock. It is not denied that such authority was expressly given by the act of 1851–2, recognized by the act of 1855–6, but it is assumed that before the bonds in fact issued, the above acts were repealed by the adoption of the code in 1858. By the 12 section of chapter 191 of the acts of 1851–2 certain counties in Middle Tennessee were authorized to subscribe for stock in railroad companies, chartered for the purpose of building roads through said counties, provided the question be first submitted to the voters of the county; and by subsequent sections, if a majority of the voters decide in favor of the subscription, it is made the *duty* of the county court to make the subscription, issue the bonds, and levy and collect an annual tax to meet the interest and create a sinking fund. By the 20th section,

the preceding provisions are extended and made applicable to other counties, including the county of Hawkins; and by chapter 61, sec. 2 of the acts of 1855–6, still further extended to certain counties. These acts were undoubtedly in force at the time the election was held, and the subscription made, and it is not denied in argument that the bonds issued in 1866 were in accordance with the power thus given. But the bill assumes that these acts were repealed by the adoption of the code.

The 41st section of the code is in these words: "All public and general acts passed prior to the present session of the General Assembly, and all public and special acts the subjects whereof are revised in this code, except acts establishing or regulating special courts, subject to the limitations and with the exceptions herein expressed, are hereby repealed, and in case of any conflict between the acts of this session and this code, the latter shall be controlling." Section 42, "Local, special, and private acts, and acts of incorporation heretofore passed, are not repealed unless it be herein so expressed," etc.

The general subject of county subscription to the stock of railroad companies was revised by the code, and a different mode provided for the payment of the stock. That is to say subscriptions authorized payable in yearly instalments. These provisions of the code are taken mainly from the act of 1851–2, chapter 117, passed prior to chapter 191 before referred to. Chapter 117, as well as the code, make general provisions applicable to all counties. Chapter 191, in the section referred to, gives special power to the county of Hawkins and other counties, and these special acts are not revised or intended to be repealed by the code, especially when the same had been acted upon, and the subscription made before the code was adopted. The position however is taken in the bill, that the proposition submitted to the voters of Hawkins county was specifically to subscribe $50,000, payable in five annual instalments, and the county court had no power to change the terms of the contract, and issue bonds in payment of the unpaid instalments. The first act of 1851–2, that is, chapter 117, did provide that the notice of the proposed election should specify the amount of stock proposed to be taken, and when payable, upon which the vote of "subscription" or "no subscription" was to be taken. But chapter 191, made specially applicable to Hawkins and certain other counties, did not require the terms of the subscription to be advertised, but simply that the subscription for the amount of stock proposed, be assented to by the vote.

Both acts being in force, and the latter expressly authorizing the issuance of bonds in payment of the subscription, and the power having been exercised and acquiesced in by the county for several years, we hold that the bonds are not void. It is well settled that where the *power* to issue the bonds exists, they are not void, although errors and irregularities may have supervened in the exercise of the power. The change of the terms of payment has been too long acquiesced in to be now corrected, and the court having the power

to issue the bonds, they are valid. Other questions have been made as to the validity of the bonds, but they have not been pressed, in fact the learned counsel for the complainants has not seriously denied their validity. The only point relied upon—and that not confidently—was upon the supposed repeal of chapter 191 of the acts of 1851–2, by the 41st section of the code.

But the bill has another aspect. It contains a detailed statement of the taxes assessed by the county court of said county, since the issuance of the bonds, from which it is undertaken to be shown that the levy was far in excess of the amount required; and furthermore, that the taxes so derived and collected have not been properly applied in paying the interest due, or in extinguishing the principal of the bonds. And the relief prayed for, as we understand it, is that the county court, as the agent of the county, be required to account and show what has become of the money—that a general account of the finances of the county be taken. We see no ground upon which the cause on this theory can be entertained. The chancery court has no jurisdiction to supervise the action of the county court in the matter of assessment of taxes for any purpose, unless it be in those cases where the county court refuses altogether to perform its duty in regard to the levy of taxes to meet its obligations, and where the duty may be enforced by mandamus.

But the amount of taxes to be levied for general or special purposes, is left to the discretion of the county court, and we know of no authority in the chancery court to revise its action and reduce the amount. The action of the county court is more legislative than judicial in this respect, and whether there be any remedy or not, we think it is clear that there is not in the chancery court; and it is equally clear that the county court cannot be called to account in the chancery court for the management of the county finances.

If the officers of the county responsible for the collection and disbursement of the county funds are in default, the remedies against them are ample and are specially provided; but a bill in equity to compel the justices of the county composing the county court, as such, to give an account of their proceedings, and to submit their action to review by accounts in the chancery court, is, we think, a proceeding unknown to our laws.

The decree of the chancellor, sustaining the demurrer, will be affirmed, with costs.

McFARLAND, Judge.

STATE OF TENNESSEE.

I, J. F. Deaderick, clerk of the Supreme Court of said State, at Knoxville, do hereby certify that the foregoing is a full and true copy of the opinion pronounced by said court, in the cause therein named, at its September term, 1880, as the same appears of record in my office. Given under my hand and the seal of said court, at office in Knoxville, this 7th day of October, 1880.

[SEAL.] J. F. DEADERICK, Clerk.